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In The

Supreme Court of the United States

October Term, 1993

MEDICAL SOCIETY OF THE STATE OF NEW YORK and NATHANIEL H. SOLOMON,

Petitioners,

v.

THOMAS SOBOL, as Commissioner of the Department of Education of the State of New York, DAVID AXELROD, as Commissioner of the Department of Health of the State of New York, EDWARD V. REGAN, as Comptroller of the State of New York, DALL W. FORSYTHE, as Director of the Budget of the State of New York, MARIO M. CUOMO, as Governer of the State of New York, and the BOARD OF REGENTS OF THE STATE OF NEW YORK,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where under state and federal law, a licensed professional has a property interest in his or her license, but is required by state law to register in order to use the license, does the licensee have a constitutionally protected property interest in the registration?

2. Does the Contract Clause of the Constitution apply to implied contracts between a State and its subjects?

3. Where a state requires licensed physicians to register every three years as a condition to being able to practice medicine, requires payment in advance of the full three-year fee, issues certificates stating that they are valid for the full three-year period, but then cancels the registrations after only two years and requires physicians to register and pay again with no provision for refund or credit, has the state violated (a) the Takings Clause of the Fifth Amendment or (b) the Contract Clause (Art. I, § 10) of the Constitution?

PARTIES TO THE PROCEEDING

All the parties are named in the caption.

STATEMENT PURSUANT TO RULE 29.1

Petitioner the Medical Society of the State of New York owns all the stock of MSSNY Services, Inc., and is affiliated with Medical, Educational and Scientific Foundation and with Empire Medical, Scientific and Educational Foundation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the Medical Society of the State of New York and Nathaniel H. Solomon respectfully petition for a writ of *certiorari* to review the judgment and opinion issued by the court below.

OPINIONS BELOW

The opinion of the Court of Appeals denying the motion for reargument or, in the the alternative, for permission to appeal was entered January 18, 1994, and is not officially reported at this time. A-22-23.[1] The opinion of the Court of Appeals dismissing the appeal *sua sponte* is reported at 82 N.Y.2d 802, 604 N.Y.S.2d 558, 624 N.E.2d 696 (1993). A-1. The opinion of the Appellate Division is reported at 192 A.D.2d 78, 600 N.Y.S.2d 177 (3d Dept. 1993). A-2. The opinion of the Supreme Court, Albany County (Keegan, J.) is reported at 153 Misc.2d 815, 583 N.Y.S.2d 145 (Sup. Ct. 1992). A-8.

JURISDICTION

The Court of Appeals dismissed Petitioners' appeal on October 19, 1993. Petitioners filed a timely motion for reargument, or in the alternative, for permission to appeal, which the Court of Appeals denied on January 18, 1994. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment

The Due Process Clause of the Fifth Amendment to the United States Constitution provides in pertinent part:

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[1] Refers to the Appendix to the *Petition for a Writ of Certiorari*.

> [N]or [shall any person] be deprived of life, liberty, or property, without due process of law;

The Takings Clause of the Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

Fourteenth Amendment

The Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Article I, Section 10

The Contract Clause of the United States Constitution provides in pertinent part:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .

1990 N.Y. Laws, Chapter 190, § 280

> Notwithstanding any provision of law, rule or regulation to the contrary, the triennial registration period for licensed physicians set in accordance with the provisions of section 6524 of the education law, which commenced January 1, 1989 and was to extend until December 31, 1991 shall extend until December 31, 1990 and the succeeding triennial registration period otherwise due to commence January 1, 1992 shall

instead be a biennial registration period commencing January 1, 1991.

Relevant sections of the New York Education Law are set forth in the Appendix at A-37 to A-40.

STATEMENT

A. Introduction

This petition presents the question whether a state that requires licensed physicians to register every three years and to pay the full three-year registration fee in advance, may legislatively cancel the third year of outstanding registrations and require physicians to register and pay again, with no provision for refund or credit for the cancelled year.

Petitioners, the Medical Society of the State of New York suing on behalf of its members, and Dr. Nathaniel H. Solomon, claim that the State's action violated the Takings and Contract Clauses of the United States Constitution. It is undisputed that a medical license is a valuable property right under New York law, a conclusion amply supported by this Court's precedents. It is also undisputed that New York law forbids the practice of medicine without a valid registration. The trial court held that physicians have a property interest in the term of their registrations. The court also held that the registration process results in a contract that the payment of the stipulated three-year fee entitled the registrant to a three-year registration. The court granted summary judgment to petitioners.

The appellate court reversed, holding that physicians have no property interest in their registrations because they are "ministerial and financial in nature," that physicians suffered no taking of their right to practice because the additional expense was "limited," and that the registration process does not create contractual rights protected by the Constitution.

As will be shown in greater detail below, this case is important because if uncorrected, it puts at risk every license, permit or franchise issued by any governmental agency to any person or business.

B. New York's System of Licensing and Registration of Physicians as it Existed Before 1990

Under New York law, a physician must possess a license in order to practice medicine. N.Y. Educ. Law § 6502 (McKinney 1985 & Supp. 1993). A license to practice medicine may be obtained by following the requirements set forth in the Education Law and in regulations promulgated by the Education Department. *See* 8 N.Y.C.R.R. §§ 24, 59 (1993). Applicants must complete extensive educational and training requirements and must pass difficult and comprehensive examinations to qualify. *Id.* § 60.

Once a physician passes these rigorous requirements and obtains a license to practice medicine, that license is "valid during the life of the holder unless revoked, annulled or suspended by the board of regents." N.Y. Educ. Law § 6502(1) (McKinney 1985). However, in addition, the "licensee *must register with the [Department of Education] to practice in this state.*" N.Y. Educ. Law

§ 6502(1) (emphasis added). Each licensed physician is responsible for registering with the Department of Education. 8 N.Y.C.R.R. § 59.8(a) (1993). Because a licensed physician "must register with the [Department of Education] to practice in [New York]," an unregistered physician cannot legally practice medicine in New York. Only a licensed and registered physician is entitled to practice medicine and to use the title "physician." N.Y. Educ. Law §§ 6503, 6522 (McKinney 1985).

Beginning January 1, 1983, registration of physicians was put on a triennial schedule. N.Y. Educ. Law § 6524(8) (McKinney 1985); 8 N.Y.C.R.R. § 59.8(a). Under this scheme, all physicians were required to register by January 1, 1983, and to renew their registrations by January 1, 1986, January 1, 1989, and January 1, 1992. The three-year registration fee was specified by statute (N.Y. Educ. Law § 6524(8)) and required to be paid in full at the time of each registration or renewal.

Willfully failing to register is considered to be "professional misconduct." N.Y. Educ. Law § 6509(8) (McKinney 1985). "Any practitioner who willfully refuses to register shall be subject to the penalties set forth in section 6511 of [the Education Law.]" 8 N.Y.C.R.R. § 59.8(a); N.Y. Educ. Law § 6509(a) (McKinney 1985). Section 6511 of the Education Law, entitled "Penalties for professional misconduct," sets forth penalties ranging from censure and reprimand to suspension or revocation of license. Section 6511 also provides that "annulment of license or registration" is a possible penalty for professional misconduct. Before any finding of professional misconduct

can be made, however, even for failure to register, Education Law § 6510-a requires that specified procedures for notice and hearing be followed.[2]

In 1988, before the triennial period that began January 1, 1986 expired, the State sent registration renewal applications to all registered physicians. Each application form stated: "This is your application to re-register your professional license for the triennial period indicated on the reverse side of this form. Registration is required if you intend to practice your profession in New York State during the period indicated . . . To be registered, you must send both the completed application form and registration fee." These renewal applications were preprinted with certain information for each physician, including petitioner Dr. Nathaniel H. Solomon.[3] Among the items preprinted were the name and address of the registered physician, his or her license number, and the registration period for which the application was to be submitted.

Physicians registering for the first time after 1988 received from the State an instruction book along with blank application forms. The instruction book contained a table expressly setting forth the beginning and ending periods for the triennial registration periods.

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[2] The Education Law borrows the notice and hearing procedures from Title II-A of article two of the Public Health Law (N.Y. Pub. Health Law §§ 230 *et seq.* (McKinney 1993)).

[3] Dr. Solomon submitted an affidavit in support of petitioners' motion for summary judgment on the takings and contract clause issues in the trial court. That affidavit is included in the Appendix beginning at A-25.

After their applications were processed, both new and renewal applicants received registration certificates attesting that the person named in the certificate had been registered by the State to practice medicine in New York State for the "registration period end[ing] 12/31/91."[4] The certificate itself must be "conspicuously displayed by each licensee in each office in which" the physician practices. 8 N.Y.C.R.R. § 59.8(c) (1993).

C. The 1990 Changes: Increased Registration Fee, and Cancelled Third Year of Outstanding Registrations

In 1990, as part of an omnibus tax bill, the New York Legislature made two changes to the registration system. First, the State changed the timing of registration from every three years to every two years, and increased the fee from $120 for a three-year registration to $210 for a two-year registration.[5] 1990 N.Y. Laws, Chapter 190, § 278. Petitioners do not challenge the prospective collection of higher registration fees at more frequent intervals. This change, however, standing alone, would have immediately affected only new registrants, and would not have raised significant new revenues until late 1991, when the 1989-92 triennial period would expire and all physicians

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[4] The words "registration period ends" appear in the lower left part of the certificate, with the date "12/31/91" printed above.

[5] Counting other fees payable at the time of registration, the total registration fee after the 1990 change was $330. The bulk of the fees is, by law, collected by the Education Department and used to fund the state office of professional medical conduct.

would be required to renew their registrations. To bring in money sooner, the Legislature hit upon an ingenious solution: cancel the remaining third year of all outstanding registrations, and require physicians to register again, at the higher price. The Legislature accomplished this in Section 280 of Chapter 190 of the Laws of 1990.[6]

Section 280 provided that the "triennial registration period for licensed physicians . . . which commenced January 1, 1989 and was to extend until December 31, 1991 shall extend to December 31, 1990. . . . " By legislative legerdemain, a three-year period expired in only two years. This provision is what petitioners challenge here.

The practical effect of the new law is illustrated by Dr. Solomon. Dr. Solomon has been licensed as a medical doctor in New York since 1936. A-26. When he renewed his registration in 1988, he paid all applicable fees, plus an additional fee for a duplicate certificate for his second office, as required by regulation. A-26-27. Dr. Solomon received registration certificates stating on their face that he was registered for the period ending 12/31/91. A-27.

In compliance with the new law, Dr. Solomon renewed his registration for the new two-year period at the $330 fee, plus an additional fee for a duplicate certificate. A-29. Dr. Solomon had no choice but to comply if he

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[6] This statute is set out in full at pages 3-4 of the *Petition*.

intended to remain in practice.[7] In effect, he was forced to register twice to be registered in 1991: once in 1988, and again in 1991; yet he received back from the State no part of the fee paid in 1988.

D. Proceedings Below

1. The Pleadings

Petitioners served their complaint on or about December 28, 1990. The action was brought in New York Supreme Court, Albany County. The defendants included, among others, Thomas Sobol, the Commissioner of the Department of Education, who is responsible for the registration of licensed physicians and for collection and disbursement of registration fees; and Edward V. Regan, Comptroller of the State of New York, who is the state official authorized to effect any refund that may be ordered by a court. Petitioners asserted six causes of action, of which two became the prime focus of the litigation. The first cause of action, captioned "TAKING," alleged in ¶ 56 that "[a] licensed, registered physician has a valuable property right both in his or her license and in the term of the registration. Furthermore, the continued validity of a registration is vital to a physician's use of his or her license." Petitioners alleged that the State's obliteration of the third year of all outstanding

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[7] In April, 1991, Dr. Solomon received a letter from Long Island Jewish Medical Center, where he is on the medical staff, informing him that failure to obtain a new registration for 1991 would "jeopardiz[e his] medical staff appointment." A-28.

registrations took physicians' property without just compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[8]

The Fourth Cause of Action in the Complaint was captioned "IMPAIRMENT OF CONTRACT." Petitioners alleged that "[t]he State of New York, by among other things enacting laws mandating a 'triennial registration period,' by accepting applications and fees for registrations for a three-year period designated by the State, contracted to issue and honor certificates of registration for a term of three years."[9] Petitioners alleged that "Section 280 of c.190, L.1990 impairs the obligations of the State's contracts with all licensed physicians who have, or who are entitled to have, registrations valid through the end of 1991 in violation of the contract clause of the United States Constitution, Article I, section 10." Petitioners also alleged that the statute violated the substantive and procedural requirements of due process under the federal and state constitutions.

In addition, petitioners pleaded claims alleging that Section 280 deprived physicians of property without due process under the Fifth and Fourteenth Amendments to the United States Constitution as well as under the New York Constitititution, and that Section 280 violated principles of substantive due process under both the state and federal constitutions.

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[8] Petitioners also alleged that the statute violated the takings clause of the New York Constitution.

[9] Complaint, ¶ 67.

Defendants answered, admitting, among other things, that "a professional license is a valuable property right which cannot be revoked without due process of law; that a licensee must, pursuant to Education Law § 6502, register with the Education Department to practice in this state; and further admit that any practitioner who willfully refuses to register is subject to the penalties for professional misconduct described in Education Law § 6511."[10]

2. The Trial Court Holds the Statute Unconstitutional

After discovery, petitioners moved for summary judgment on the Takings and Contract Clause claims. Defendants cross-moved for summary judgment dismissing the complaint. The trial court ruled in petitioners' favor on both the Takings and Contract Clause issues, declared the statute unconstitutional, and ordered the State to pay compensation.

The trial court (Keegan, J.) started from the proposition that "[i]t is undisputed that physicians have a constitutionally protected property interest in their licenses to practice medicine." A-11, citing *Board of Regents v. Roth*, 408 U.S. 564 (1972). "The issue here," said Judge Keegan, "is whether physicians have a constitutionally protected property interest in their registrations. This court finds in the affirmative." *Id.*

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[10] Answer, ¶ 26.

Judge Keegan reasoned that because physicians cannot make use of their professional licenses without a valid registration, the registration "is equally as important" as the license. A-12. "Where the Department of Education issues registration certificates for a fee which are supposed to be valid until the end of a set registration period, the state creates a constitutionally protected property interest in the term of the registration. *A physician has a legitimate claim of entitlement in the validity of his or her registration until the stated expiration.* This entitlement allows physicians to practice their profession." *Id.* (emphasis added).

Having found that physicians have a constitutionally protected property interest in the term of their registrations, Judge Keegan had no difficulty finding that the 1990 law deprived physicians of that interest. He correctly recognized that petitioners did not challenge the power of the State to change the law as it affects future registrations; the vice of this law is its "retroactive aspect" that "forced physicians to pay twice for the same benefit of being registered for 1991." A-13.

Judge Keegan also found for petitioners' favor on the Contract Clause claim. Quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), a case prominently relied on by petitioners, Judge Keegan held that a contract with a State may be formed not merely by the express terms of a statute, but that "rights may accrue under a statute or even be conferred by it, of such a character as to be regarded as contractual, and such rights cannot be defeated by subsequent legislation." A-14. Correctly noting that petitioners argued not merely that the medical registration statutes are contracts but that the registration

process is itself contractual, with all the elements of offer, acceptance and consideration, Judge Keegan held: "The statutory registration process which consists of the issuance of certificates in exchange for a fee does give rise to a contractual relation between the State and licensed physicians." A-14.

Judge Keegan found it clear that the 1990 law "altered the terms of physician registrations by reducing the State's obligation to physicians for an entire year" (A-15), and that this impairment of physicians' rights was substantial. *Id.* Judge Keegan found that the State had not offered any valid justification for the impairment of physicians' rights. A-16. Said the court: "The State's issuance of registration certificates would be meaningless if it could be overcome by the State's desire to invalidate them at will." A-15.

Judge Keegan declared Section 280 "unconstitutional and void" under the Takings and Contract Clauses, and directed defendants to refund all registration fees paid pursuant to the new law applicable to the 1991 calendar year. A-17.

3. The Appellate Division Reverses

Defendants appealed Judge Keegan's decision, and the Appellate Division, Third Department reversed. Addressing the Contract Clause claim first, the appellate court held that because the medical profession "is comprehensively and pervasively regulated," the statutes and regulations governing physicians cannot give rise to contractual rights. A-5. In the appellate court's view, the

question was not whether the registration *process* created contractual rights, but whether any particular statute could be pointed to as a contract. A-5. The court answered this question negatively: "The statutes in question are clearly general in scope based upon public policy considerations and cannot be interpreted to manifest a legislative intent to create private rights of a contractual nature enforceable against the State." *Id.*

The appellate court dealt summarily with the takings claim. The court agreed that "[b]eyond peradventure, a medical license is a valuable property right." *Id.* The court also acknowledged that "a valid registration is necessary to use a medical license." A-6. However, the court refused to find that a registration is a constitutionally protected property interest, because it is "ministerial and financial in nature." *Id.*

The appellate court then held that, "to the extent [the 1990 law] affects the underlying licenses, it effects no taking." *Id.* The court took "particular[ ] note [of] the limited financial impact on the overall practice of medicine" which, coupled with "the de minimis effort involved in the reregistration process," led in the court's view to at most only a "remote effect upon, or interference with, the ability of doctors to fully utilize their medical licenses." *Id.*

4. Proceedings at the Court of Appeals

Petitioners appealed as of right to the New York Court of Appeals, which dismissed the appeal *sua sponte* for want of a substantial constitutional question. A-1.

Petitioners filed a timely motion for reargument or, in the alternative, for permission to appeal. This motion was denied by the Court of Appeals on January 18, 1994. A-22-23.[11]

REASONS FOR GRANTING THE WRIT

I. THIS CASE THREATENS ALL HOLDERS OF GOVERNMENTAL LICENSES, PERMITS AND FRANCHISES WITH REGISTRATION REVOCATION ANY TIME THE GOVERNMENT NEEDS MONEY

The sheer breadth of the potential effect of the holding of the court below is breathtaking: if upheld, no holder of any governmental license, permit or franchise – and that means just about everyone – will be safe from having his or her registration revoked any time the government deems it in its interest to find new sources of revenue. Drivers whose licenses and registrations require periodic renewal, and lawyers who must periodically register with court administrators, will alike be subject to what has befallen doctors in New York, and no principle will stop state governments from revoking permits as often as they see fit. Representatives of organizations of nurses and dentists filed affidavits in the New York Court of Appeals supporting petitioners; both affidavits point

[11] The fact that the New York Court of Appeals declined to hear petitioners' appeal is no bar to review by this Court. *See, e.g., Yee v. City of Escondido*, ___ U.S. ___, 112 S. Ct. 1522, 1527 (1992).

out that the appellate ruling threatens all professionals who pay periodic license and registration fees.[12]

Over thirty years ago, in his seminal article arguing for the creation of a "new property" to take account of the dependence of people on government "benefits" such as licenses in the modern political economy, Professor Charles Reich wrote:

> One of the most important developments in the United States during the past decade has been the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses.
>
> * * *
>
> The wealth of more and more Americans depends upon a relationship to government. Increasingly, Americans live on government largess – allocated by government on its own terms, and held by recipients subject to conditions which express "the public interest."

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[12] The affidavits of Sherry Chase of the Dental Society of the State of New York, and of Richard Silber on behalf of the New York State Nurses Association, are included in the Appendix at A-32-36. Ms. Chase avers that her organization has over 10,600 members who pay periodic registration fees and who are thus potentially subject to exactly the same treatment as physicians: "Under the Third Department's decision, every professional who pays such a fee is affected." A-33. Similarly, Mr. Silber, who represents an organization with 35,000 members in New York, states that the opinion of the court below "sets a precedent having a negative impact on every citizen in the State of New York who pays a license or registration fee." A-36.

Charles A. Reich, *The New Property*, 73 Yale L.J. 732, 732 (1964). Professor Reich singled out government control over occupational licenses as a source of individual dependence on governmental largess. *Id.* at 741. As evidence of the breadth of this dependence, he noted that in New York City, the city government

> dispenses and revokes licenses for exhibitions and performances, billiard and pool tables, bowling alleys, miniature golf, sidewalk cafes and stands, sightseeing guides, street musicians, public carts, expressmen, porters, junk dealers, pawnbrokers, auctioneers, laundries, wardrobe concessionaires, locksmiths, masseurs, bargain sales, bathhouse keepers, rooming houses, barbers, garages, refuse removal, cabarets, coffee houses, and cannon firing.

Id. at 758-59. This list, of course, took no note of the myriad licenses and permits overseen by state, county and federal officials.

Thirty years later, the list of regulated persons is undoubtedly far longer. This Court has not been blind to the threat to freedom inherent in such widespread dependence on governmental largess, and has in the interim extended the protection of the Takings, Due Process and Contract Clauses to many of the interests identified by Professor Reich. The Court has held that welfare benefits, being "a matter of statutory entitlement," may not be terminated without due process. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). In *Bell v. Burson*, 402 U.S. 535, 539 (1971), the Court held that motor vehicle registrations and driver's licenses are "important interests" protected by the Fourteenth Amendment. In *Fuentes v. Shevin*, the

Court held that due process required notice and an opportunity to be heard before a person may be subject to the replevin of personal property, even if the property is "nothing more than an assortment of household goods." 407 U.S. 67, 84 (1972).

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Court formulated a general rule that stands today:

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests – property interests – may take many forms.
>
> * * *
>
> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Id. at 576, 577. The Court has applied the *Roth* "legitimate claim of entitlement" standard to define "property interests" not only in cases claiming lack of due process,[13] but in cases alleging takings. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *Webb's Fabulous Pharmacies, Inc.*

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[13] *See, e.g., Barry v. Barchi*, 443 U.S. 55, 65 (1979) (horse trainer had "legitimate claim of entitlement" to his license, and had right to a hearing before New York authorities could suspend it).

v. Beckwith, 449 U.S. 155, 161 (1980).[14] The Court even "dusted off" the contract clause after forty years, and held that when the State impairs its own contracts, the usual justifications will not suffice. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977).

If not disturbed, the opinion of the court below would allow the government to require licensees to pay over and over again for their licenses, or their registrations, without fear of invading any protected interests or incurring liability in contract. As Judge Keegan found, "[t]he State's issuance of registration certificates would be meaningless if it could be overcome by the State's desire to invalidate them at will." A-15. Commentators from both extremes of the political spectrum agree that control over people's ability to earn a living is anathema to liberty. *See* Richard A. Epstein, *Bargaining With The State* 196-99 (1993);[15] Samuel Bowles and Herbert Gintis, *Democracy & Capitalism* 204 (1987).[16] The opinion of the

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[14] The Court has never held that "property" means different things in the takings than in the due process contexts. As one commentator has noted, to give the term different meanings within the Fifth Amendment "is not a natural reading of the document and would make claims of textual interpretation hard to sustain." Leonard Kreynin, Note, *Breach of Contract as a Due Process Violation: Can the Constitution be a Font of Contract Law?* 90 Colum. L. Rev. 1098, 1106 (1990).

[15] Epstein argues that use of government power over licensees is dangerous, echoing Reich, and uses as an example the professional licensing of physicians and lawyers.

[16] Bowles and Gintis argue for increased "democratic" control over the economy, because "lack of secure access to one's livelihood is a form of dependency, one that confers power on those who control the means of life." The focus of their concern is not the government, however, but the owners of capital.

court below threatens wholesale invasion of licenses and registrations any time the government finds a need for additional revenue, which is, as all know, a perpetual condition.

When John Fogerty sang, "Who'll take the promise that you don't have to keep?" his answer – "Don't look now, it ain't you or me" – was a comment on economic privilege.[17] If sung today, it would be an ironic warning to us all: today, the state takes advantage of doctors, but tomorrow it could be you or me.

II. THE COURT SHOULD TAKE THIS OPPORTUNITY TO CLARIFY WHEN GOVERNMENT PERMISSION TO USE PERSONAL PROPERTY, SUCH AS A REGISTRATION OF A PROFESSIONAL LICENSE, IS ITSELF A PROPERTY INTEREST PROTECTED BY THE CONSTITUTION

The court below held that even though it is "beyond peradventure" that a medical license is a valuable property right, and that the holder of such a license cannot use it unless he or she is registered, the registration itself is not a "property interest" protected by the Constitution because it is "ministerial and financial." A-6. This novel

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[17] J.C. Fogerty, *Don't Look Now*, on Creedence Clearwater Revival, *Willy & The Poor Boys* (Fantasy Records 1969). Creedence Clearwater Revival ("CCR"), "recently inducted into the Rock and Roll Hall of Fame, has been recognized as one of the greatest American rock and roll groups of all time." *Fogerty v. Fantasy, Inc.*, ___ U.S.___, 114 S. Ct. 1023, 62 U.S.L.W. 4153, 4154 n.2 (March 1, 1994). John Fogerty was CCR's leader. *Id.*

construct is a serious departure from this Court's precedents that, if not reversed, can have far-reaching consequences.

The court below was surely correct that a medical license is a valuable property right. Furthermore, there is no question but that a physician's property interest in his or her license cannot be taken away without due process. "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957) (citations omitted).

"Man has indeed as much right to work as he has to live, to be free, to own property. . . . The Bill of Rights does not say who shall be doctors or lawyers or policemen. But it does say that certain rights are protected, that certain things shall not be done. *And so the question here is not what government must give, but rather what it may not take away.*" *Barsky v. Board of Regents*, 347 U.S. 442, 472-73 (1954) (Douglas, J., dissenting) (emphasis added). In the words of Justice Black, also dissenting in *Barsky*: "I have no doubt that New York has broad power to regulate the practice of medicine. But the right to practice is, as Mr. Justice Douglas shows, a very precious part of the liberty of an individual physician or surgeon. It may mean more than any property." *Id.* at 459 (Douglas, J., dissenting).[18]

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[18] In *Barsky*, the Court upheld the action of New York's Board of Regents in suspending the license of a physician who had been convicted for failing to produce documents in response to a congressional subpoena in the course of an

Given the importance of a professional license, "[a]ny restriction on the use of a professional license affects a critical private interest." Toni M. Massaro and Thomas L. O'Brien, *Constitutional Limits on State-Imposed Continuing Competence Requirements for Licensed Professionals*, 25 William & Mary L. Rev. 253, 303 (1983). Yet, the import of the decision of the court below – that a licensed physician has no property interest in registration – is that a registration could be revoked without complying with minimal due process, let alone providing compensation. Such a result would be shocking indeed.[19]

This Court has repeatedly held that "property" means not only the "physical thing" but also "the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). *Accord, Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

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investigation into alleged "anti-American activities." The Court held, among other things, that the practice of medicine is a privilege, not a right, that may be "lawfully prohibited by the State except upon the conditions it imposes." 347 U.S. at 451. The Court's decision in *Schware* three years later effectively gutted the vitality of *Barsky*. *See* John R. Rydell, II, Note, *Due Process Limitations on Occupational Licensing*, 59 U. Va. L. Rev. 1097, 1101 (1973) (*Schware* "exemplifies the abandonment of *Barsky*"). Today, it is clear that the "right/privilege" distinction is irrelevant to the question of whether a property interest protected by the constitution exists. *Golberg v. Kelly*, 397 U.S. 254, 262 (1970).

[19] It would doubtless shock even New York's legislators, who expressly provided that a registration may not be revoked or annulled without notice and hearing. N.Y. Educ. Law § 6510-a. Although the court below could have taken judicial notice of this statute, it was specifically pleaded in ¶ 28 of the complaint.

The Court's holdings also show that there can be "property interests" in two different, related aspects of the same "bundle of rights." For example, the Court has held that "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States," *Lynch v. United States*, 292 U.S. 571, 579 (1934); yet the Court has also held that a mortgagee's lien on real property is itself "property." *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935). Thus, both the mortgage and the lien are protected property interests.[20] Similarly, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1981), the Court found a taking where Florida deemed interest earned on money deposited into court to be property of the county where the court was located. The Court found a taking of the property interest in the interest, even though the state in no way took any of the principal: "The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." 449 U.S. at 164. Said the Court: "a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court." *Id.*

Under these cases, there is no reason why a licensee cannot have a property interest in both his or her license

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[20] Indeed, governmental action that completely destroys a secured party's security interest would almost certainly be a taking, even if the government left intact the creditor's contractual rights to repayment. *United States v. Security Industrial Bank*, 459 U.S. 70, 77-78 (1982).

as well as in the registration that is necessary to make use of the license.

To the extent the court below intended to create a "de minimis" exception to the Fifth and Fourteenth Amendments, its ruling is unprecedented as well as unjustified. Just as the fact that something may have value to someone does not alone make it "property," the possibility that a thing's value may be small does not deprive it of protection. "Property, a creation of law, does not arise from value. . . . Property depends upon exclusion by law from interference." *International News Serv. v. Associated Press*, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting). In *Security Ind. Bank, supra*, the Court acknowledged the Government's argument that the interest of a secured party arising out of a nonpurchase-money, nonpossessory interest in personal property is "insubstantial," but found no support for the Government's position that such an interest is not property. 459 U.S. at 76. In *Fuentes v. Shevin, supra*, the Court held there was a property interest in an assortment of household possessions. 407 U.S. at 89. Even takings that are temporary, where the property is ultimately restored to the original owner, must be compensated. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 317-19 (1987).

Furthermore, physicians' interest in their registrations cannot be called "de minimis." A physician cannot practice his or her profession in New York without a valid registration. The financial impact on individual physicians – being forced to pay an extra $165 to be registered for 1991 – applies equally to interns as to established practitioners. The cumulative impact of the

statute – being forced to pay an extra $165 to be registered for 1991 – multiplied across the more than 50,000 registered physicians, is over $8,000,000. In any event, the proper focus here is not on the financial impact on physicians of the additional fee, but the fact that, as Judge Keegan found, the statute "took away one year of valid registration rendering physicians unable to practice in 1991, unless they reregistered and paid again." A-12.

In sum, "just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, . . . neither may it do so by invoking nonexistent rules of state substantive law." *Stevens v. City of Cannon Beach*, ___ U.S. ___, 62 U.S.L.W. 3621, 3622 (March 21, 1994) (Scalia, J., dissenting from denial of *certiorari*) (citation omitted). The court's labeling of a physician's interest in his or her registration "ministerial and financial" cannot control whether the registration is a property interest protected by the constitution. "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). "No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation." *Stevens, supra* (Scalia, J., dissenting from denial of *certiorari*), citing *Webb's Fabulous Pharmacies, supra*. The Court should grant *certiorari* to decide whether, where under state and federal law a licensed professional has a property interest in his or her license but is required to register in order to use the license, the

protection of the Takings and Due Process Clauses extends to the registration as well as to the license.

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY WHETHER THE CONTRACT CLAUSE APPLIES TO IMPLIED CONTRACTS BETWEEN A STATE AND ITS SUBJECTS

The court below held, in effect, that the Contract Clause of the Constitution does not apply to implied contracts between a State and its subjects. Contrary to the ruling of the trial court, the court below rejected the argument that the registration process of offer (the statute and regulations, the instruction book sent to applicants); acceptance (the return by applicants of the completed forms along with payment of the full three-year fee); partial performance (the delivery by defendants of completed certificates stating on their face their validity for a three-year term) creates contractual rights and expectations.

The court below focused exclusively on the registration provisions in the relevant statutes, found that those statutes are merely one part "of governing the conduct of this heavily regulated business," are "based upon public policy considerations," and therefore "cannot be interpreted to manifest a legislative intent to create private rights of a contractual nature enforceable against the State." A-5. Thus, the court below appears to have ignored entirely the possibility that the Contract Clause of the Constitution applies not merely where a statute is expressly crafted as a contract, but where statutes and

regulations authorize conduct that creates *implied* contracts.

This Court recently held that "[t]he question whether a contract was made is a federal question for purposes of Contract Clause analysis, and 'whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment.' " *General Motors Corp. v. Romein*, ___ U.S. ___, 112 S. Ct. 1105, 1110 (1992) (first citation omitted), quoting *Appleby v. City of New York*, 271 U.S. 364, 380 (1926).

This Court has never decided whether the Contract Clause applies to implied-in-fact contracts between a State and its citizens, where there is no single document labeled "contract," "bond" or "charter." However, this Court's precedents strongly suggest that implied contracts are within the ambit of the clause. In *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938), this Court held that "it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdvisions within the protection of Art. I, § 10."

There can be no question that under both the "general" law as well as under the law of New York, an implied contract will be found to exist if all the elements are present. *See* John D. Calamari and Joseph M. Perillo, *Contracts* § 1-12 (1977); *Restatement (Second) of Contracts* §§ 24, 50, 71 (1981). *See also Jemzura v. Jemzura*, 36 N.Y.2d 496, 503-04, 330 N.E.2d 414, 420, 369 N.Y.S.2d 400, 408 (1975); *Ahern v. South Buffalo Ry. Co.*, 303 N.Y. 545, 561, 104 N.E.2d 898 (1952), *aff'd*, 344 U.S. 367 (1953). It is clear

that New York enforces implied contracts against the State. *See* N.Y. Ct. of Claims Act § 9(2) (McKinney 1989) (providing the Court of Claims with jurisdiction to "hear and determine the claim of any person . . . against the state . . . for the breach of contract, express or implied. . . . ").[21]

There can also be no question that if the State were an ordinary commercial actor, under the facts of this case, a contract would certainly be found to exist. Consider, for example, a mail-order service that provides multi-year magazine subscriptions. Would anyone doubt that a subscriber who paid in advance the full price for a three-year subscription to any publication, be it *Sports Illustrated* or *American Lawyer*, would have a contractual cause of action if the service cancelled her subscription after only two years but did not return any portion of the purchase price?

By refusing to find the State bound by contractual obligations under circumstances where any commercial actor clearly would be bound, the court below effectively reversed the presumption against allowing states to impair their own contracts. While the Contract Clause will generally not upset state legislation that is reasonably designed to further a legitimate state interest, even

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[21] This case was not filed in the Court of Claims because that court does not have jurisdiction to issue a declaratory judgment, *Fehlhaber Corp. v. State*, 69 A.D.2d 362, 373, 419 N.Y.S.2d 773, 779 (3d Dept. 1979) or to hold the state liable for statutes later determined to be unconstitutional. *Fonfa v. State*, 88 Misc. 2d 343, 346, 388 N.Y.S.2d 65, 67 (N.Y. Ct. Cl. 1976). No party, and none of the courts below, disputed that subject matter jurisdiction was proper in this case.

though private contracts are impaired, this Court has held that similar deference is *not* appropriate when the state's self interest is at stake, because:

> A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977). This Court should grant *certiorari* to determine whether the Contract Clause applies to implied contracts between States and their subjects.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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STATE OF NEW YORK,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of October 1993

Present, Hon. Judith S. Kaye, Chief Judge, presiding

Mo. No. 1152 SSD 79

Medical Society of the State of New York et al.,
Appellants,
v.
Thomas Sobol, as Commissioner of the Department of Education, et al.,
Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

/s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

Supreme Court – Appellate Division

Third Judicial Department

Decided and Entered: July 8, 1993 66953

MEDICAL SOCIETY OF THE STATE OF NEW YORK et al.,
Respondents,
v
THOMAS SOBOL, as Commissioner of the Department of Education, et al.,
Appellants.

OPINION AND ORDER

Calendar Date: May 28, 1993

Before: Weiss, P.J., Mercure, Mahoney and Casey, JJ.

Robert Abrams, Attorney-General (Daniel Smirlock of counsel), Albany, for appellants.

Le Boeuf, Lamb, Leiby & MacRae (Jay G. Safer of counsel), New York City, for respondents.

Weiss, P.J.

Appeal from an order of the Supreme Court (Keegan, J.), entered July 13, 1992 in Albany County, which, *inter alia*, granted plaintiffs' motion for summary judgment and declared the Laws of 1990 (ch 190, § 280) to be unconstitutional.

The question presented on this appeal is whether legislation (L 1990, ch 190, § 280) which reduced the

period of physicians' registration (Education Law § 6524 [8]; 8 NYCRR 59.8) by one year and concomitantly increased the registration fee from $240 to $330 violates the Contract Clause of the US Constitution, takes physicians' property without compensation and denies physicians their right to due process. In the underlying action challenging the constitutionality of that portion of the legislation which terminated the third year of the triennial registration scheduled to end December 31, 1991, Supreme Court granted plaintiffs' motion for summary judgment, finding that the statute effected an unconstitutional impairment of contract rights between physicians and the State and a taking of their property. This appeal by defendants ensued.

The inquiry as to whether a statute unconstitutionally[1] impairs a contract (US Const, art I, § 10) posits three components: (1) whether there is a contractual relationship, (2) whether a change in law impairs that contractual relationship, and (3) whether the impairment is substantial (*see, General Motors Corp.* v *Romein*, ___ US ___, 112 S Ct 1105). Here, plaintiffs contend that a statute (Education Law § 6524 [8]), with its implementation by regulation (8 NYCRR 59.8), created the contract now alleged to be statutorily impaired. It is black letter law that absent some clear indication that the Legislature

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[1] "That a legislative enactment will be presumed constitutional is an elementary but significant principle of law. * * * 'While this presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt' * * * " (*Marcus Assocs.* v *Town of Huntington*, 45 NY2d 501, 505 [citations omitted]).

intends to bind the State contractually, a statute is presumed not to create private contractual or vested rights, but merely to declare a policy to be pursued until the Legislature shall ordain otherwise (*Dodge* v *Board of Educ.*, 302 US 74, 79). This strong presumption is based upon the premise that the Legislature's principal function is to make laws to establish the policy of the State and not to make contracts, and that policies, quite unlike contracts, are inherently subject to revision and repeal (*National R.R. Passenger Corp.* v *Atchison, Topeka & Santa Fe Ry. Co.*, 470 US 451, 466). The party asserting the creation of a contract must overcome this presumption (*id.*) and it is well settled that before a law may be deemed to be a contract between the State and a third party (in this instance many thousands of individual physicians), examination of the statutory language must show it to be plain and susceptible of no other reasonable construction than that a contract was intended (*see, Pennsylvania R.R.Co. v. State of New York*, 11 NY2d 504, 511). The Court of Appeals in *Pennsylvania R.R. Co.* v *State of New York* (*supra*) stated:

> "It is never to be assumed," this court has said, "that the State has * * * fettered its power in the future, except upon clear and irresistible evidence that the engagement was in the nature of a private contract, as distinguished from a mere act of general legislation; and that such, in the particular instance, was the actual and deliberate intention of the State authorities" (*id.*, at 511, quoting *People* v *Roper*, 35 NY 629, 633).

Before a statute will be deemed to be a contract, its language and circumstances must "manifest a legislative intent to create private rights of a contractual nature

enforceable against the State" (*Cook* v *City of Binghamton*, 48 NY2d 323, 330). The initial question, then, is whether the Legislature, in passing Education Law § 6524 (8) (L 1971, ch 987, § 2) and the amendments thereto (L 1976, ch 77, § 5; L 1982, ch 55, § 48; L 1987, ch 43, § 6), intended to create private rights of a contractual nature enforceable against the State (*see, Association of Surrogates & Supreme Ct. Reporters Within City of N.Y.* v *State of New York*, 79 NY2d 39, 45). We find that it did not.

The practice of medicine within the State, as a matter of public policy, is comprehensively and pervasively regulated. The challenged fee structure is merely one measure of governing the conduct of this heavily regulated business. The statutes in question are clearly general in scope based upon public policy considerations and cannot be interpreted to manifest a legislative intent to create private rights of a contractual nature enforceable against the State (*see, Cook* v *City of Binghamton, supra*, at 330-331). Within this criteria plaintiffs have failed to meet their burden of establishing the unconstitutionality of the statute (L 1990, ch 190, § 280) which, in essence, merely increased the registration fee involved (*see, id.*, at 330; *see also, Medical Malpractice Ins. Assn.* v *Cuomo*, 74 NY2d 651, 653).

Defendants also contend that Supreme Court erred in determining that the Laws of 1990 (ch 190, § 280) effected an unconstitutional taking of a physician's property by changing the termination date of those physician registrations issued in 1989. The claimed property is the term of the registration, which itself is part of the State regulatory scheme governing the practice of medicine. Beyond peradventure, a medical license is a valuable property right

(*see, Matter of Doe* v *Axelrod*, 123 AD2d 21, 26, *revd on other grounds* 71 NY2d 484). But while a valid registration is necessary to use a medical license, it is ministerial and financial in nature. We find that there is no property right in the duration of the registration. To the extent the Laws of 1990 (ch 190, § 280) affects the underlying medical licenses, it effects no taking.

The 5th Amendment of the US Constitution " * * * '[is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' " (*Penn Cent. Transp. Co.* v *City of New York*, 438 US 104, 123, quoting *Armstrong* v *United States*, 364 US 40, 49). There is no set formula to determine if a taking has occurred (*id.*, at 124). The principal factors of particular significance, to be considered on an ad hoc basis, are (1) the economic impact of the regulations on the party claiming a taking, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action (*Connolly* v *Pension Benefit Guar. Corp.*, 475 US 211, 225). Another factor, not relevant here, is whether the taking amounts to a permanent physical occupation of property (*see, Loretto* v *Teleprompter Manhattan CATV Corp.*, 458 US 419, 432). In our consideration of factors as they affect the instant case, we particularly note the limited financial impact on the overall practice of medicine. That economic impact, together with the de minimis effort involved in the reregistration process, has, at best, only a remote effect upon, or interference with, the ability of doctors to fully utilize their medical licenses. The revenue gained is used in policing the quality of medical care within the

State, the heavily regulated business interest from which the revenue is raised. In sum, we conclude that no unconstitutional taking has occurred.

As a final note, we reject the argument that procedural or substantive due process violations occurred from the lack of individualized notice of the change to each physician, and notice of the right to hearings regarding the changes in the registration fee and time periods. The Legislature need only enact and publish laws and afford the public a reasonable opportunity within which to become familiar with its terms and to comply therewith (*see, Texaco Inc.* v *Short*, 454 US 516, 532).

Mercure, Mahoney and Casey, JJ., concur.

ORDERED that the order is reversed, on the law, with costs, plaintiffs' motion denied, defendants' motion granted, summary judgment awarded to defendants and it is declared that the Laws of 1990 (ch 190, § 280) have not been shown to be unconstitutional.

ENTER:

/s/ Michael J. Novack

Michael J. Novack
Clerk

[Dated: April 10, 1992]

DECISION

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

MEDICAL SOCIETY OF THE STATE OF NEW YORK AND NATHANIEL H. SOLOMON,

Plaintiffs,

-against-

THOMAS SOBOL, as Commissioner of the Department of Education of the State of New York, DAVID AXELROD, as Commissioner of the Department of Health of the State of New York, EDWARD V. REGAN, as Comptroller of the State of New York, DALL W. FORSYTHE, as Director of the Budget of the State of New York, MARIO M. CUOMO, as Governor of the State of New York, and the BOARD OF REGENTS OF THE STATE OF NEW YORK,

Defendants.

(Supreme Court Albany County Motion Term)
(RJI No. 01-91-ST-2970)

APPEARANCES: LeBoeuf, Lamb, Leiby & MacRae
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DECISION

KEEGAN, J.

Plaintiffs in this action assert that § 280 of Chapter 190 of the Laws of 1990 which amends Education Law § 6524, is unconstitutional and should be declared void. Plaintiffs contend that § 280 violates the due process clauses of the Federal and New York State Constitutions and move for summary judgment and for a compensatory remedy.

Defendants' [sic] cross-move for summary judgment declaring plaintiffs' constitutional claims meritless and upholding the validity of § 280.

Education Law § 6524 sets forth the requirements for physician licensing in New York State. These requirements include that all licensed physicians must register with the Department of Education in order to practice their profession. (See also Education Law § 6502 subsection (1)). Prior to the enactment of § 280, physicians were required to renew their registrations every three years. Registrations were valid until the end of the third year when registration renewal would again be mandated. Upon renewal, physicians must pay a statutory registration fee.

The enactment of § 280 changed future registration periods from a triennial to a biennial basis. Section 280 also provided that the triennial period then in progress, which was to extend to December 31, 1991 was to extend instead only to December 31, 1990, and that the succeeding triennial period otherwise due to have commenced on January 1, 1992 was to be a biennial period commencing on January 1, 1991. Valid three year registrations were automatically transformed into two-year registrations. The third year of the 1989 prepaid registration period, that is the year 1991, was completely eliminated.

Physicians who registered for the first time or who renewed their registrations as of January 1, 1989 received certificates from the Department of Education stating that their registrations were valid until December 31, 1991. The statutory registration fee covered the entire triennial period from January 1, 1989 to December 31, 1991. Plaintiffs' position concerns the effect of the change caused by § 280 on the 1989 registration period; primarily that physicians were required to pay an additional fee to be registered for the 1991 year which they had already paid for in 1989.

Plaintiffs assert that the elimination of the third prepaid year of registration in 1991 constituted a taking of property without due process and just compensation. Plaintiffs also assert that § 280 impaired the state's contractual obligations with holders of valid three-year registrations. Plaintiffs request that summary judgment be granted declaring § 280 unconstitutional and void and directing defendants to refund all paid registration renewal fees applicable to calendar year 1991.

Plaintiffs primary contention is that defendants violated the fifth amendment "taking" clause of the United States Constitution and Article I of § 7 of the New York State Constitution when they eliminated the third prepaid year of the 1989 registration period. Plaintiffs contend that physicians have a constitutionally protected property interest in their registrations which allows them as licensed physicians to practice medicine in New York State. Elimination, therefore of the third year of registration, plaintiffs argue, was a taking without just compensation because it rendered licensed physicians unable to practice in 1991 unless they paid and registered again for that year.

It is undisputed that physicians have a constitutionally protected property interest in their licenses to practice medicine *Board of Regents v. Roth,* 408 US 564.

The issue here is whether physicians have a constitutionally protected property interest in their registrations. This court finds in the affirmative.

"Property" includes more than just actual ownership of realty, chattels or money. It includes interests already acquired in specific benefits. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth,* supra. *Alliance of American Insurers v. Chu,* 77 NY2d 573.

Since Education Law §§ 6524 and 6502 subsection (1) require that all licensed physicians must register with the

Department of Education in order to practice, a physician's registration is equally as important as his or her medical license. Unless a physician registers, having a medical license is useless since the physician cannot practice without a valid registration certificate. Where the Department of Education issues registration certificates for a fee which are supposed to be valid until the end of a set registration period, the state creates a constitutionally protected property interest in the term of the registration. A physician has a legitimate claim of entitlement in the validity of his or her registration until the stated expiration. This entitlement allows physicians to practice their profession.

The question that now follows is whether § 280 violates the "taking" clause of the Federal and State constitutions. "Wherever the operation and effect of any general regulation is to extinguish or destroy that which by the law of the land is the property of any person, so far as it has that effect, it is unconstitutional and void. Thus, a law is considered as being a deprivation of property within the meaning of this constitutional guaranty if it deprives an owner of one of his essential attributes, destroys or impairs its value, restricts or interrupts its common necessary or profitable use, hampers the owner in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it and thereby seriously impairs its value." See 16A Am. Jur.2d § 586; *People v. Hawkins*, 157 NY1 at 7, *Re Application of Jacobs*, 98 NY 98.

Section 280 took away one year of valid registration rendering physicians unable to practice in 1991, unless they reregistered and paid again according to the new

biennial registration system. Hence, § 280 in this respect is hereby declared void and unconstitutional only as it effected a taking of physicians' property for 1991 without just compensation. Such compensation must be given.

Plaintiffs' position does not include, as defendants suggest, that the state is prohibited from changing the law as it affects future registrations. Rather, plaintiffs' focus is on the retroactive aspect of § 280 which forced physicians to pay twice for the same benefit of being registered for 1991. "Although a statute is not invalid merely because it reaches back to establish the legal significance of events occurring before its enactment, a traditional principal applied in determining the constitutionality of such legislation is that the legislature is not free to impair vested or property rights". *Matter of Hodes v. Axelrod*, 70 NY2d 364. See also *United States Trust Co. v. New Jersey*, 431 US 1.

Defendants also suggest that no such taking occurred because physicians could simply reregister for 1991 in order to continue practicing. However, if the initial act amounts to an unlawful taking, then permitting physicians to avoid suspension by paying twice to be entitled to practice for the same year does not make the statute lawful. See *Seawall Assocs. v. City of New York*, 74 NY2d 92.

Plaintiffs' second contention is that § 280 also violates the contract clause of the United States Constitution. (Art.I§10.cl.1). Plaintiffs assert that the reduction of the 1989-91 registration period by one year substantially impaired the state's contractual obligation to valid registration holders. Physicians had paid the required registration fees for the right to practice in 1991, and § 280,

plaintiffs argue, revoked this right unless additional fees were paid.

The essential question here rests on the existence of a contractual relation; whether the operation of § 6524 and 6502(1) of the Education Law gives rise to a contractual relation between the state and physicians by implication. See *Cook v. City of Binghamton*, 48 NY2d 323.

The 1989 triennial registration period was set for licensed physicians in accordance with the provisions of § 6524 of the Education Law. The registration system allowed physicians to practice in New York until 1991. Registration certificates issued by the Department of Education clearly stated that the registration period beginning on January 1, 1989 was to extend to December 31, 1991. Physicians paid in advance the required registration fee to cover all three years in this period.

"It is a matter of established law that a legislative enactment in the ordinary form of a statute may contain provisions which, when accepted as the basis of action by individuals or corporations become contracts between them and the state within the probation of the clause of the Federal Constitution forbidding impairment of contract obligation; right may accrue under a statute or even be confirmed by it, of such character as to be regarded as contractual, as such right cannot be defeated by subsequent legislation." *Indiana ex rel Anderson v. Brand*, 303 US 95.

The statutory registration process which consists of the issuance of certificates in exchange for a fee does give rise to a contractual relation between the state and licensed physicians. The state, according to §§ 6524 and

6502(1) hence creates contractual rights in the holders of the registration certificates. Physicians are thereby given the right to practice medicine in New York State.

The next inquiry is whether the enactment of § 280 has impaired the rights of valid registration holders granted by the registration contract with the State. The obligation of contract guaranty is impaired when a statute changes the intention and legal effect of the original parties, giving to one a greater or the other a lesser interest or benefit of the contract. Impairment also occurs when a statute alters the terms of a contract by imposing new conditions or dispensing with conditions, or adds new duties or a different liability, releases or lessens any part of the contract obligation or substantially defeats its end. 16A Am. Jur.2d § 695.

Section 280 altered the terms of physician registrations by reducing the state's obligation to physicians for an entire year. This reduction substantially impairs the purpose of the registration process. The state's issuance of registration certificates would be meaningless if it could be overcome by the state's desire to invalidate them at will.

Once substantial impairment is found, a careful examination of the nature and purpose of the state legislation must be made. *Association of Surrogates & Supreme Court Reporters v. State of New York*, 940 F.2d 766 (2d. Cir.1991). To determine whether legislation violates the contract clause, the question is "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 US 398.

The State's justification for its breach of commitment to physicians is the general enhancement of revenues for the State Board for Professional Medical Conduct. Defendants assert that the state has a legitimate interest in investigating and policing medical misconduct within its borders. This cannot be disputed. However, the issue here is whether the measures taken by the state are reasonable and appropriate to advance this interest. This court finds that they are not so reasonable and so appropriate as to warrant the impairment of the state's contractual obligation to physicians.

Section 278 of Chapter 190 which also amends Education Law 6524, raised the registration fees for licensed physicians. The increased revenue obtained from these legislative changes is a reasonable and appropriate means to achieve the state's interest in policing the quality of medical care in New York State. The same however, cannot be said for the change made pursuant to § 280 which cuts short by one year the 1989 triennial registration period.

The state fails to demonstrate how the impairment of 1989 registrations was essential to the maintenance of the quality of medical care. Requiring additional fees from physicians to be registered for 1991 is quite obviously in no way necessary to the achievement of the state's purpose. In view of the aforementioned, it is hereby declared that § 280 deprived physicians of their registrations for 1991 and impaired their right to practice medicine for that year without due process of law. Physicians had a right to practice according to their registrations in 1991, and this right cannot be arbitrarily taken away, regardless

of whether physicians could ransom their right by paying additional registration fees.

As § 280 of Chapter 190 of the Laws of 1990 is declared unconstitutional and void, as applied to the triennial registration ending in 1991, the defendants are directed to refund all registration renewal fees paid pursuant to § 280 applicable to the 1991 calendar year.

Accordingly, plaintiff's motion for summary judgment is granted. Defendant's cross-motion for summary judgment is denied. So ordered.

/s/ Thomas W. Keegan
THOMAS W. KEEGAN
Signed pursuant to
CPLR 9002

DATED: APRIL [10], 1992
AT ALBANY, NEW YORK

At IAS Part 3 of the Supreme Court of the State of New York in and for the County of Albany, at the Courthouse, located on Eagle Street, on the ___ day of May, 1992

PRESENT: *[HON. THOMAS W. KEEGAN J.S.C.]*, Justice

MEDICAL SOCIETY OF THE STATE OF NEW YORK and NATHANIEL H. SOLOMON, Plaintiffs, -against- THOMAS SOBOL, as Commissioner of the Department of Education of the State of New York, DAVID AXELROD, as Commissioner of the Department of Health of the State of New York, EDWARD V. REGAN, as Comptroller of the State of New York, DALL W. FORSYTHE, as Director of the Budget of the State of New York, MARIO M. CUOMO, as Governor of the State of New York, and the BOARD OF REGENTS OF THE STATE OF NEW YORK, Defendants.	Index No. 2165-91 ORDER AND JUDGMENT (Filed July 13, 1992)

Plaintiffs Medical Society of the State of New York and Nathaniel H. Solomon having moved this Court by Notice of Motion, dated September 3, 1991, for an order pursuant to CPLR 3212 granting summary judgment and (a) declaring Section 280 of Chapter 190 of the Laws of 1990 to be unconstitutional and void, insofar as Section 280's obliteration of the third year of physicians' valid three-year registrations took physicians' property for public use without just compensation, unconstitutionally impaired the State's contractual obligations, and deprived physicians of property without due process of law; and (b) directing defendants to refund all registration renewal fees paid pursuant to Section 280 which are applicable to the calendar year 1991; and defendants Thomas Sobol, as Commissioner of the Department of Education of the State of New York, David Axelrod, as Commissioner of the Department of Health of the State of New York, Edward V. Regan, as Comptroller of the State of New York, Dall W. Forsythe, as Director of the Budget of the State of New York, Mario M. Cuomo, as Governor of the State of New York, and the Board of Regents of the State of New York, having cross-moved by Notice of Cross Motion dated October 2, 1991, for order granting summary judgment declaring plaintiffs' constitutional claims meritless and upholding the validity of Section 280; and this matter having come before the Court on October 23, 1991,

NOW, upon the reading and filing of plaintiffs' Notice of Motion, dated September 3, 1991; the Affidavit of Dr. Nathaniel H. Solomon, sworn to August 26, 1991, in support of the motion, and the exhibits annexed

thereto; the affidavit of Stephen H. Orel, sworn to September 3, 1991, in support of the motion, and the exhibits annexed thereto; and the Notice of Cross Motion, dated October 2, 1991; and plaintiffs having appeared by their counsel, LeBoeuf, Lamb, Leiby & MacRae, by Jay G. Safer, Stephen H. Orel, and by Donald R. Moy; and defendants having appeared by their counsel Robert Abrams, Attorney General of the State of New York, by Jeffrey M. Dvorin; and the motion and cross motion having been submitted to the Court on October 23, 1991; and the Court having rendered a decision dated April 10, 1992, signed by the Honorable Thomas W. Keegan, A.J.S.C., pursuant to CPLR 9002 granting plaintiffs' motion and denying defendants' cross motion,

NOW, upon the motion of LeBoeuf, Lamb, Leiby & MacRae, attorneys for plaintiffs, and in accordance with said decision, it is

ORDERED and ADJUDGED that plaintiffs' motion for summary judgment is granted, and defendants' cross motion for summary judgment is denied, and it is further

ORDERED and ADJUDGED, that Section 280 of Chapter 190 of the Laws of 1990 is declared unconstitutional and void, as applied to the triennial registration of physicians ending in 1991; and it is further

ORDERED and ADJUDGED that defendants Thomas Sobol, as Commissioner of the Department of Education of the State of New York, David Axelrod, as Commissioner of the Department of Health of the State of New York, Edward V. Regan, as Comptroller of the State of New York, Dall W. Forsythe, as Director of the Budget of the State of New York, Mario M. Cuomo, as Governor of

the State of New York, and the Board of Regents of the State of New York, are directed to refund all registration renewal fees paid pursuant to Section 280 of Chapter 190 of the law of 1990, applicable to the 1991 calendar year; and it is further

~~ORDERED and ADJUDGED that plaintiffs recover of defendants the costs and disbursements of this action in the amount of $445.00~~.

ENTER:

/s/ Thomas W. Keegan
Thomas W. Keegan
Signed pursuant to CPLR 9002

Judgment signed and
entered the [30] day of
[June], 1992
Albany, New York

Deputy County Clerk

/s/ Marie A. Reilly
Clerk

3/92

State of New York
Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION January 18, 1994

Mo. No. 1296
Medical Society of the State of New York et al.,
Appellants,
v.
Thomas Sobol, as Commissioner of the Department of Education, et al.,
Respondents.

Motion for reconsideration of this Court's October 19, 1993 order of dismissal denied. Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements. Judges Titone and Levine took no part.

STATE OF NEW YORK,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the [eighteenth] day of [January 1994]

Present, Hon. Judith S. Kaye, Chief Judge, presiding

Mo. No. 1296
Medical Society of the State of New York et al.,
Appellants,
v.
Thomas Sobol, as Commissioner of the Department of Education, et al.,
Respondents.

A motion for reconsideration of this Court's October 19, 1993 order of dismissal and for leave to appeal to the Court of Appeals in the above cause having heretofore been made herein upon the part of the appellants, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for reconsideration of this Court's October 19, 1993 order of dismissal be and the same hereby is denied; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Judges Titone and Levine took no part.

/s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

MEDICAL SOCIETY OF THE STATE OF NEW YORK and NATHANIEL H. SOLOMON, Plaintiffs, -against- THOMAS SOBOL, as Commissioner of the Department of Education of the State of New York, DAVID AXELROD, as Commissioner of the Department of Health of the State of New York, EDWARD V. REGAN, as Comptroller of the State of New York, DALL W. FORSYTHE, as Director of the Budget of the State of New York, MARIO M. CUOMO, as Governor of the State of New York, and the BOARD OF REGENTS OF THE STATE OF NEW YORK, Defendants.	Index No. 2165-91 Affidavit of Dr. Nathaniel H. Solomon

STATE OF NEW YORK)
) ss.:
COUNTY OF QUEENS)

DR. NATHANIEL H. SOLOMON, being duly sworn, deposes and states:

1. I am a practicing physician specializing in pediatrics. I am currently licensed and registered in the State of New York. I practice in two separate offices located at: 62-65 Saunders Street, Rego Park, New York and 64-15 184th Street, Flushing, New York. I am making this Affidavit on my own personal knowledge and I am competent to testify as to the matters set forth herein. I submit this Affidavit in support of the plaintiffs' motion for summary judgment.

2. I have been licensed as a medical doctor since 1936. I have always kept my license in proper order and paid for my registration. In or around September of 1988, before the previous triennial registration period had expired, I received a registration renewal application in the mail. The instructions on the reverse side of the application form stated: "Please complete all appropriate items on the registration application printed on the reverse side, sign it, and return the application in the enclosed two-way envelope. . . . Registration is required if you intend to practice your profession in NEW YORK STATE at any time during the period indicated." The renewal application was pre-printed with my name and address, my license number and the registration period which expressly indicated that I was applying for the registration period beginning January 1, 1989 through December 31, 1991. (A copy of a sample renewal application form for the 1989-1991 triennial registration period is annexed hereto as Exhibit A.)

3. As requested by the State, I filled out the application to renew my registration and sent it to the State Education Department along with a check for the $220

registration fee and a $10 additional fee for a duplicate certificate of registration for my second office.

4. In return, the State sent me a registration certificate which clearly states that "the State Education Department has registered Dr. Nathaniel H. Solomon for practice in New York State as a physician" for the "registration period end[ing] 12/31/91." (A copy of my registration certificate for the period ending 12/31/91 is annexed hereto as Exhibit B.)

5. After applying for and receiving a registration certificate from the State which expressly states that I am registered to practice medicine until December 31, 1991, I firmly believed that I was registered, and thus had the right to practice my chosen profession, through the year 1991. In September of 1990, however, I received another registration renewal application in the mail which was pre-printed for a new biennial registration period ending December 31, 1992. Along with the unexpected application, I received an explanatory notice which stated:

> **CHANGE IN REGISTRATION REQUIREMENTS FOR PHYSICIANS**
>
> Chapter 190 of the Laws of 1990 includes a provision amending the registration period for physicians and increasing the fee. As a result, members of this profession will be required to register every two years instead of every three. The current registration period for physicians, originally scheduled to expire on December 31, 1991, will instead expire December 31, 1990. To implement this change, the office of the Professions, Division of Professional Licensing Services has prepared the enclosed registration application for the new period to begin January

> 1, 1991. The new registration fee is $330. Please complete and submit the application promptly to avoid any interruption in your registration status. (Please note that physicians who have not registered by the beginning of the new period will be required to comply with the child abuse training requirement prior to registering).

(A copy of the explanatory notice is annexed hereto as Exhibit C).

6. Thereafter, I received a letter dated April 8, 1991, from the Long Island Jewish Medical Center, where I am a member of the medical staff, which stated:

> [T]he Registration Certificate which is on file expired on December 31, 1990, rather than December 31, 1991, due to the State's change in licensure policy.
>
> To date, the Medical Board Office has not received a copy of your current Registration Certificate. According to the Medical Staff By-laws, you must be currently licensed and duly registered in order to be qualified for and maintain a Medical Staff appointment at Long Island Jewish Medical Center. Please be advised that if you are not currently registered with the Department of Education, you are in violation of the Medical Staff By-laws and are jeopardizing your medical staff appointment. . . .
>
> If the Medical Board Officer fails to receive your document by April 26, 1991, your appointment to the Medical Staff of Long Island Jewish Medical Center will be terminated.

(A copy of the letter from Long Island Jewish Medical Center is annexed hereto as Exhibit D.)

7. Under protest, I completed and returned to the Department of Education my renewal application for the new 1991-92 biennial registration period along with the additional $330 fee mandated by the new law and an extra fee for another duplicate certificate of registration for my second office. I paid for the new biennial registration certificate under protest because state law requires that I must be validly registered in order to practice medicine and I was afraid that I could lose my license if I did not register. In addition, I feared that if I did not re-register for the year 1991, Long Island Jewish Medical Center would immediately terminate my position as a member of the staff at the hospital. (A copy of a sample renewal application form for the new 1991-1992 biennial registration period and my registration certificate for the biennial registration period ending 12/31/92 are annexed hereto as Exhibit E).

8. I do not understand how the State can legally obliterate the third year of my valid registration as it did. The new law simply declares that my registration which was valid until December 31, 1991 is now only valid until December 31, 1990 and I must re-register.

9. When I last registered in 1988, I paid a fee to cover the entire registration period from January 1, 1989 through December 31, 1991. The new requirement to pay a registration fee to cover the two year period from January 1, 1991 through December 31, 1992, without providing me with a refund or a credit for that portion of my previously paid registration which covers the year 1991, is most inequitable. In effect, I have been forced to pay twice to be registered in 1991 even though I have already paid for and received a certificate which prominently

states that I am registered to practice medicine through the end of 1991.

10. Originally, when I was first notified of the new law requiring me to re-register for the year 1991, I had planned to retire during 1991. I felt that it was extremely inequitable for the State to force me to re-register when I did not even plan to practice medicine beyond the year 1991 – a year for which I was already registered. During the first half of 1991 I made extensive preparations for my retirement, which was set for July. However, at the last minute, the doctor who had committed to take over my practice backed out. As a result, I am continuing my practice for the time being. My decision is motivated in part by my desire to avoid any disruption or inconvenience for my long-time patients, who might otherwise have been forced to find new doctors on short notice. I still believe, however, that if I had been able to retire in 1991 as I had planned, or if there are other validly registered doctors who are planning to retire or who have already retired in 1991, then the requirement to re-register for the year 1991 is particularly harsh.

11. My registration to practice medicine in the State of New York is just as important to me as my license. I must have a valid registration certificate in order to continue my pediatrics practice. I kept up my side of the bargain by completing the application form and paying the registration fee for the 1989-91 triennial registration period. Thereafter, the state sent me a registration certificate which expressly stated that I was validly registered through the year 1991. As a result, I feel that I was entitled to be registered through the end of 1991 as promised by the State. I should not have had to re-register

two-thirds of the way through the promised registration period. By declaring that the latest registration period is only valid through December 31, 1990 instead of 1991, the State of New York has reneged on its previously issued assurances and taken away my valid registration, and thus my right to practice medicine, for the year 1991.

/s/ Nathaniel H. Solomon
Dr. Nathaniel H. Solomon

Sworn to before me this
[26] day of August, 1991

/s/ Nathan Kleaihaudler
Nathan Kleaihaudler
Notary Public, State of New York
No. [Illegible]
Qualified in Queens County
Commission Expires March 31, [1992]

STATE OF NEW YORK, COURT OF APPEALS

MEDICAL SOCIETY OF THE STATE OF NEW YORK, et al., Applellants, -against- THOMAS SOBOL, as Commissioner of the Department of Education, et al., Respondents.	Index No. 2165-91 Albany County AFFIDAVIT IN SUPPORT OF MOTION FOR REARGUMENT OR, IN THE ALTERNATIVE, FOR PERMISSION TO APPEAL (Mo. No. 1152 SSD 79)

STATE OF NEW YORK)
: ss:
COUNTY OF ALBANY)

SHERRY CHASE, being duly sworn, deposes and says:

1. I am the General Counsel of the Dental Society of the State of New York. By this affidavit, I am respectfully requesting the Court of Appeals to accept the appeal of the Medical Society of the State of New York in the above matter.

2. I have reviewed the opinions of the Appellate Division, Third Department and of Justice Keegan in the above case and have considered the impact of the Appellate Division's ruling on members of the Dental Society

and other organizations and individuals in New York State. Like the members of the Medical Society, 10,600 members of the Dental Society are required to pay a registration fee in order to pursue their practice in the State. I believe that the opinion of Justice Keegan was correct and provided protection to professionals such as dentists and lawyers, as well as physicians.

3. When I read the opinion of the Appellate Division, Third Department I was extremely concerned by the negative impact this ruling would have for every person who pays a license and registration fee. Under the Third department's [sic] decision, every professional who pays such a fee is affected. Any person who drives or owns an automobile could have his rights impaired or taken away, even though he or she had a valid existing registration or license.

4. Thus, I was disappointed and surprised that the Court of Appeals dismissed the appeal of the Medical Society on the grounds that no substantial constitutional issue is involved. I respectfully submit that there are substantial constitutional questions and the public importance of this case merits consideration by the Court of Appeals. This is not a case that can be categorized as unimportant or unsubstantial merely because the State allows the physicians to ransom their rights by paying a dollar amount, which the State considers small. The integrity of the State of New York is important. In this case, the State has taken away one's right to practice one's profession under a certificate which, even though valid, is retroactively declared null and void; the State's agreement that a certificate would be valid for a set number of years in payment of the fee is violated at will

and becomes meaningless. For these reasons, this case is important to all of us.

5. Accordingly, I respectfully request this Court to consider my affidavit and to hear the appeal of the Medical Society of the State of New York.

/s/ Sherry Chase
Sherry Chase

Sworn to me this
[16th] day of November, 1993

/s/ Diana Freund
Notary Public

Diana Freund
Notary Public, State of New York
No. 41-[Illegible]
Qualified in Queens County
Commission Expires May [Illegible], 19[95]

STATE OF NEW YORK, COURT OF APPEALS

MEDICAL SOCIETY OF THE STATE OF NEW YORK, et al., Appellants, -against- THOMAS SOBOL, as Commissioner of the Department of Education, et al., Respondents.	Affidavit in Support of Motion for Reargument or, in the Althernative, for Permission to Appeal (Mo. # 1152 SSD 79) Index No. 2165-91

New York State, Albany County, ss:

Richard J. Silber, being duly sworn, deposes and says:

(1) I am an attorney duly admitted to practice law in New York State, and I maintain an office at 275 1/2 Lark Street, Albany, New York. Our firm represents The New York State Nurses Association and I serve as its general counsel.

(2) I am respectfully writing to the Court of Appeals to request that the Court hear the appeal of the Medical Society of the State of New York in the above captioned matter.

(3) The New York State Nurses Association has approximately 35,000 members throughout the State of New York. I have read the opinions of the Appellate Division, Third Department and of Justice Keegan regarding the above matter. We believe that the issues involved in this case are extremely important to our members and to numerous organizations and

individuals in New York State. The opinion of the Appellate Division reversing Justice Keegan's decision sets a precedent having a negative impact on every citizen in the State of New York who pays a license or registration fee. Nurses, lawyers and numberous professionals are at risk by this ruling. Every individual who pays for an automobile registration has his or her rights affected by this ruling.

(4) I understand that the Court of Appeals has dismissed the appeal of the Medical Society on the grounds that no substantial constitutional issue is involved. We believe that the issues are of great public importance and do raise substantial constitutional questions. We do not believe this is a mere ministerial matter or that the issues are limited to members of the Medical Society of the State of New York. Indeed, every member of the New York State Nurses Association is affected by this issue.

(5) We respectfully submit that the Court of Appeals should fully consider the substantial and important issues raised by this appeal. Accordingly, we respectfully ask the Court to consider this affidavit and to accept the appeal of the Medical Society of the State of New York.

/s/ Richard J. Silber
Richard J. Silber

Sworn to before me November [15], 1993

/s/ Carol A. Bassett
Notary Public

Carol A. Bassett
Notary Public, State of New York
Qualified in Washington County
Reg. #4972671
Commission Expires Oct. 1, [1994]

RELEVANT PROVISIONS OF THE N.Y. EDUCATION LAW

§ 6502. Duration and registration of a license

1. A license shall be valid during the life of the holder unless revoked, annulled or suspended by the board of regents. A licensee must register with the department to practice in this state.

2. The department shall establish the beginning dates of the registration period for each profession and mail an application for registration to every licensee currently registered at least four months prior to the beginning of the registration period for the respective profession.

3. An application for registration and the required registration fee shall be submitted together with or as a part of the application for a license. A person initially licensed or a licensee resuming practice after a lapse of registration during the last two years of a triennial registration period shall receive a prorated refund of one-third of the total registration fee for each full year of the triennial period that has elapsed prior to the date of registration. The department shall renew the registration of each licensee upon receipt of a proper application, on a form prescribed by the department, and the registration fee. Any licensee who fails to register by the beginning of the appropriate registration period shall be required to pay an additional fee for late filing of ten dollars for each month that registration has been delayed while such licensee continued to practice his profession. The licensee resuming practice after a lapse of registration shall be permitted to practice without actual possession of the

registration certificate for not more than four months after mailing to the department the required application fee.

4. Any licensee who is not engaging in the practice of his profession in this state and does not desire to register shall so advise the department. Such licensee may subsequently register and resume practice without paying an additional fee for failure to register at the beginning of the registration period.

§ 6509. Definitions of professional misconduct

Each of the following is professional misconduct, and any licensee found guilty of such misconduct under the procedures prescribed in section sixty-five hundred ten shall be subject to the penalties prescribed in section sixty-five hundred eleven:

(8) . . . wilfully failing to register. . . .

§ 6510-a. Proceedings in cases of professional misconduct involving the medical profession

1. Prehearing procedures, hearing procedures and summary action procedures. Prehearing procedures, hearing procedures and summary action procedures in cases of professional misconduct involving the medical profession shall be conducted pursuant to the provisions of Title II-A of article two of the public health law.

§ 6511. Penalties for professional misconduct

The penalties which may be imposed by the board of regents on a present or former licensee found guilty of

professional misconduct (under the definitions and proceedings prescribed in sections sixty-five hundred nine, sixty-five hundred ten and sixty-five hundred ten-a of this article) are: . . .

* * *

(4) annulment of license or registration, (5) limitation on registration or issuance of any further license. . . .

§ 6524. Requirements for a professional license

To qualify for a license as a physician, an applicant shall fulfill the following requirements:

* * *

[Subsections (8) and (9) as they existed in 1988]

(8) Fees: pay . . . a fee of one hundred twenty dollars for each triennial registration period commencing on and after January first, nineteen hundred eighty-three.

(9) For every license or registration issued after the effective date of this subdivision, an additional fee of ten dollars shall be paid and deposited in the general fund for the purpose of offsetting any expenditures made pursuant to subdivision fifteen of section two hundred thirty of the public health law. The amount of such funds expended for such purpose shall not be greater than such additional fees collected over the licensure period or for the duration of such program if less than the licensure period.

* * *

[Subsections (8)-(10) today]

(8) Fees: pay . . . a fee of two hundred ten dollars for each biennial registration period.

(9) For every license or registration issued after the effective date of this subdivision, an additional fee of thirty dollars shall be paid and deposited in the special revenue fund entitled "the professional medical conduct account" for the purpose of offsetting any expenditures made pursuant to subdivision fifteen of section two hundred thirty of the public health law. The amount of such funds expended for such purpose shall not be greater than such additional fees collected over the licensure period or for the duration of such program if less than the licensure period.

(10) For every license or registration issued after the effective date of this subdivision[1], an additional fee of ninety dollars shall be paid and deposited into the special revenue fund entitled "the professional medical conduct account" for the purpose of increasing expenditures made pursuant to section two hundred thirty of the public health law in relation to the operation of the office of professional medical conduct within the department of health. The amount of the funds expended as a result of such increase shall not be greater than such additional fees collected over the licensure period.

---

[1] May 25, 1990

No. 93-1637

(2)

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IN THE

Supreme Court of the United States

October Term, 1993

MEDICAL SOCIETY OF THE STATE OF NEW YORK and NATHANIEL H. SOLOMON,

Petitioners,

against

THOMAS SOBOL, as Commissioner of the Department of Education of the State of New York, DAVID AXELROD, as Commissioner of the Department of Health of the State of New York, EDWARD V. REGAN, as Comptroller of the State of New York, DALL W. FORSYTHE, as Director of the Budget of the State of New York, MARIO M. CUOMO, as Governor of the State of New York, and the BOARD OF REGENTS OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: May 13, 1994

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Counterstatement of Questions Presented

1. Whether this Court should grant certiorari to review whether a New York statute imposing a $92 increase in the cost of physicians' registrations for 1991 impairs a property right created by prior legislation, when the court below assumed *arguendo* that a property right had been created and correctly concluded, relying on the precedents of this Court, that the impairment of that right effected by the challenged legislation was too minimal to rise to the level of an unconstitutional taking of property.

2. Whether this Court should grant certiorari to clarify whether the Contract Clause of the United States Constitution applies to implied contracts between a State and its citizens, when that issue has been resolved for more than sixty years and the court below, applying the precedents of this Court, correctly concluded that the New York statute assertedly creating contractual rights on behalf of petitioners instead did no more than express the general public policy of the State and did not establish any contractual obligations.

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93-1637

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

MEDICAL SOCIETY OF THE STATE OF NEW YORK and NATHANIEL H. SOLOMON,

Petitioners,

against

THOMAS SOBOL, as Commissioner of the Department of Education of the State of New York, DAVID AXELROD, as Commissioner of the Department of Health of the State of New York, EDWARD V. REGAN, as Comptroller of the State of New York, DALL W. FORSYTHE, as Director of the Budget of the State of New York, MARIO M. CUOMO, as Governor of the State of New York, and the BOARD OF REGENTS OF THE STATE OF NEW YORK,

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

The Statutory Scheme

A physician who is licensed to practice medicine in New York State must also register with the State Education De-

partment in order to practice in New York. NY Educ. Law § 6502(1) (McKinney 1985 & Supp 1993). The requirements for the registration of physicians in New York State are found in section 6524 of the Education Law. Until the 1990 change in the law that is the subject of this litigation, NY Educ. Law § 6524(8) provided for registration of all physicians triennially, with the first triennial period, applicable to all physicians, beginning on January 1, 1983, and the succeeding periods to begin January 1, 1986, January 1, 1989 and January 1, 1992. Prior to 1989, the total registration fee, payable triennially, was $220, consisting of three components: "a fee of one hundred twenty dollars for each triennial registration period commencing on and after January first, nineteen hundred eighty-three," NY Educ. Law § 6524(8) (McKinney 1985), to be "collected by the department of education and deposited to the professional medical conduct account," 1989 NY Laws, ch 43, § 61, which funds the state office of professional medical conduct; "an additional fee of ten dollars [to] be paid and deposited in the general fund for the purpose of offsetting any expenditures made pursuant to" NY Pub. Health Law § 230(15) (McKinney 1993), which provides for grants for the funding of physicians' committees designed "to confront and refer to treatment physicians who are thought to be suffering from alcoholism, drug abuse or mental illness," NY Educ. Law § 6524(9) (McKinney 1985); and "an additional fee of ninety dollars [to] be paid and deposited in the general fund for the purpose of increasing expenditures made pursuant to [NY Pub. Health Law § 230] in relation to the operation of the office of professional medical conduct within the department of health," NY Educ. Law § 6524(10) (McKinney 1985). The office of professional medical conduct carries out the administrative, investigatory and legal functions of the State Board of Professional Medical Conduct, NY Pub.

Health Law § 230(10) (McKinney 1993), which is responsible for dealing with "matters of professional misconduct" in the medical profession, NY Pub. Health Law § 230(1) (McKinney 1993). In 1989, Section 6524(9) of the Education Law was amended to increase the "additional fee" from $10 to $30, to be paid and deposited not into the "general fund" but rather "into the special-revenue fund entitled 'the professional medical conduct account,' " again for the purpose of offsetting expenditures made pursuant to Public Health Law § 230(15).

Section 278 of Chapter 190 of the New York Laws of 1990 amended Education Law § 6524(8) to raise the basic fee for each registration period from $120 to $210. The additional fees of $30 and $90 imposed by § 6524(9) and (10) respectively remained unchanged, except that the $90 fee is now to be "paid and deposited into the special revenue fund entitled 'the professional medical conduct account' for the purpose of increasing expenditures made pursuant to [NY Pub. Health Law § 230] in relation to the operation of the office of professional medical conduct within the department of health." 1990 NY Laws, ch 190, § 279. In addition, 1990 NY Laws, ch 190, § 280 provided that "the triennial registration period for licensed physicians set in accordance with [NY Educ. Law § 6524], which commenced January 1, 1989 and was to extend until December 31, 1991 shall extend until December 31, 1990 and the succeeding triennial registration period otherwise due to commence January 1, 1992 shall instead be a biennial registration period commencing January 1, 1991." Thus, as a result of the New York Laws of 1990, physicians went from having a $240 registration fee that covered a three-year period to having a $330 fee covering a two-year period. In addition, 1991, the first year of the first of these scheduled biennial registration periods, had been, before the change in the law, the last year of a triennial period that had commenced in 1989.

The Present Action

On December 28, 1990, plaintiffs-petitioners ("plaintiffs") Medical Society of the State of New York and Nathaniel H. Solomon commenced the present action in the New York Supreme Court, Albany County, challenging on constitutional grounds the change from a triennial to a biennial period, claiming that Section 280 "obliterates the third year of the three year period that physicians have already paid for," thus "nullif[ying] the certificates of registration that physicians have received" and instead requiring them to "re-register by January 1, 1991" and "pay the new, higher fee" by that time (24).[1] Plaintiffs challenged § 280 as, *inter alia*, a taking of "the property of physicians for public use without just compensation," in violation of the federal and state constitutions, in that it supposedly "obliterat[es] the third year of a valid three-year registration period." They also contended that § 280 is an unconstitutional impairment of "the obligations of the State's contracts with all licensed physicians who have, or who are entitled to have, registrations valid through the end of 1991" (37-38). Plaintiffs also asserted causes of action for "deprival of property without due process," "substantive due process," "equity and fairness," and "equal protection and legislative intent" (37-39). Defendants duly answered (41), and both sides moved for summary judgment (47, 102).

The Decisions Below

On April 10, 1992, the Supreme Court issued a decision granting plaintiffs' motion for summary judgment and denying defendants' motion (10). After concluding that "physicians have a constitutionally protected property interest in

[1]Parenthetical citations are to the Record on Appeal before the Appellate Division, Third Department.

their registrations," the Supreme Court found that § 280 took from physicians "one year of valid registration" for which they had already paid and "forced" them "to pay twice for the same benefit of being registered for 1991" (13-15). This, said the court, was a taking of their "property for 1991 without just compensation" (14). The Supreme Court also held that § 280 violated the contract clause of the United States Constitution. The court initially concluded that "[t]he statutory registration process which consists of the issuance of [registration] certificates in exchange for a fee" gives rise "by implication" to "a contractual relation between the state and licensed physicians" (16). In the court's view, § 280 substantially impaired physicians' statutorily-created "contractual" rights in their registrations because it "altered the terms" of those registrations "by reducing the state's obligation to physicians for an entire year" (17). The State Supreme Court declared § 280 "unconstitutional and void, as applied to the triennial registration of physicians ending in 1991," and required defendants "to refund all registration renewal fees paid pursuant to [§ 280 and] applicable to the 1991 calendar year" (8).

Defendants duly appealed from the order and judgment embodying the State Supreme Court's decision (2). On May 28, 1993, the Appellate Division, Third Department issued an opinion and order reversing the Supreme Court's decision, granting summary judgement to defendants and declaring that 1990 NY Laws, ch 190, § 280 had not been shown to be unconstitutional (A-2).[2] Dealing first with plaintiffs' claim that the challenged legislation impaired their contractual rights, the Appellate Division noted that "[i]t is black letter law that absent some clear indication that

[2]Parenthetical citations preceded by "A" are to the Appendix to the petition herein.

the Legislature intends to bind the State contractually, a statute is presumed not to create private contractual or vested rights, but merely to declare a policy to be pursued until the Legislature shall ordain otherwise" (A3-4). Moreover, said the court, "it is well settled that before a law may be deemed to be a contract between the State and a third party * * *, examination of the statutory language must show it to be plain and susceptible of no other reasonable construction than that a contract was created" (A4).

The Appellate Division concluded that the statute did not create contractual rights on behalf of plaintiffs. As the court noted, the practice of medicine in New York State "is comprehensively and pervasively regulated" as a matter of public policy, with the challenged fee structure "merely one measure of governing the conduct of this heavily regulated business" (A5). The legislation at issue was, the court said, "clearly general in scope based upon public policy considerations and cannot be interpreted to manifest a legislative intent to create private rights of a contractual nature enforceable against the State" (A5).

The Appellate Division next rejected plaintiffs' contention that the challenged statute effected an unconstitutional taking of physicians' property. The court noted that, while "a medical license is a valuable property right" and "a valid registration is necessary to use a medical license," the registration "is ministerial and financial in nature" (A5-6). The court thus found "that there is no property right in the duration of the registration" (A6).

Moreover, the Appellate Division added, to the extent the statute "affects the underlying medical licenses, it effects no taking" (A6). The court summarized the "principal factors"

in determining whether an unconstitutional taking has occurred as "(1) the economic impact of the regulations on the party claiming a taking, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action" (A6). Recognizing both "the limited financial impact [of the challenged statute] on the overall practice of medicine" and "the de minimis effort involved in the reregistration process," the Appellate Division held that the statute "has, at best, only a remote effect upon, or interference with, the ability of doctors to fully utilize their medical licenses" (A6). In addition, said the court, the revenue raised by the change in the registration scheme returns to the medical profession, for it "is used in policing the quality of medical care within the State, the heavily regulated business interest from which the revenue is raised" (A7).

Plaintiffs attempted to appeal as of right to the New York Court of Appeals, which on October 19, 1993 dismissed the appeal *sua sponte* "upon the ground that no substantial constitutional question is directly involved" (A1). Plaintiffs then moved for reconsideration of that dismissal and for leave to appeal to the Court of Appeals. These motions were denied on January 18, 1994 (A22).

REASONS FOR DENYING THE WRIT

I.

As the court below correctly concluded, the challenged Legislation does not effect an unconstitutional taking of physicians' property.

Despite plaintiffs' hyperbolic argument to the contrary, the legislation they challenge did not effect an unconstitu-

tional taking of physicians' property. The Appellate Division correctly held both that physicians had no property right in the terms of their registrations *per se*, and that the minimal effect of section 280 on licenses to practice medicine does not rise to the level of a "taking." Both conclusions are unexceptionable and require no review by this Court.

Plaintiffs first affect to believe (Pet, pp 16-21) that "the potential effect" of this case is to threaten "any governmental license, permit or franchise." The parade of horribles they marshall in support of this abstract proposition marches so breathlessly from Richard A. Epstein to Creedence Clearwater Revival that it never pauses to examine what actually occurred *in this case*. The legislation in question does not involve the "right" to practice medicine in New York. It effects no more than a slight change in the marginal cost of a physician's registration. When physicians registered for a triennial term commencing in 1989, they paid a total of $220 for their registrations, or roughly $73 per year. With the shift to a biennial registration period beginning with 1991, they paid $330, or $165 per year. This case thus involves no more than a $92 increase in the cost of physicians' registrations for 1991. Imposing this small increase in cost on the privilege of practicing medicine in New York does not affect the availability of professional registration or any other identifiable "property" interest physicians have. And indeed, plaintiffs have not alleged that any physician in New York could not pay the increased fee.

Moreover, a physician's failure to pay this additional fee does not result in a "taking" of his or her license or registration. The only penalty invariably imposed on "[a]ny licensee who fails to register by the beginning of the appro-

priate registration period" is the obligation "to pay an additional fee for late filing of ten dollars for each month that registration has been delayed while such licensee continue[s] to practice his profession." NY Educ. Law § 6502(3) (McKinney 1985). The New York Legislature obviously contemplated that a physician who inadvertently failed to register would continue to practice medicine for a time, even without a valid registration. It is true that, as plaintiffs note (Pet, pp 6-7), "willfully failing to register" is elsewhere defined by law as "professional misconduct" subjecting physicians to penalties including censure, suspension, revocation or annulment of license, and a fine of no more than $10,000. NY Educ. Law § 6530(12) (McKinney 1985); NY Pub. Health Law § 230-a (McKinney 1993). But any penalty must follow a finding by the state board for professional misconduct that the physician in question is guilty of professional misconduct, NY Pub. Health Law § 230-a (McKinney 1993), and such a finding of guilt can occur only after an elaborate set of mandated proceedings, including a formal investigation, a full hearing before a committee on professional conduct, and (at the physician's option) review of the committee's determination by an administrative review board. *See*, NY Pub. Health Law § 230(10) (McKinney 1993). The only certain consequence of a failure to comply with the new registration scheme is the eventual imposition of a $92 additional fee for 1991 plus a minimal monthly late fee. The actual "invasion of [physicians'] licenses and registrations" that plaintiffs purport to fear (Pet, p 21) is remote and speculative. Even more remote is "the potential effect" of this case on the licenses and registrations of others not before the Court. This case, as the Appellate Division understood and New York's highest court—which did not even deem plaintiffs' claims sufficiently substantial to warrant its review—affirmed, is not

about a "threat to freedom" (Pet, p 18). It is about nothing more than a State legislature's power to increase the cost of a single year of a physician's registration from $73 to $165. There is no reason for this Court to review the case in order to arrive at the inevitable and unexceptionable conclusion that the exercise of this power is not unconstitutional.

Nor does the Appellate Division's conclusion that physicians have "no property right in the duration of the registration" require this Court's review. Plaintiffs would have this Court grant certiorari to determine whether, when a licensed professional "has a property interest in his or her license but is required to register in order to use the license, the protection of the Takings and Due Process Clauses extends to the registration as well as to the license" (Pet, pp 26-27). The Appellate Division's decision, however, makes an answer to this question unnecessary. What this case is about, both sides concede, is the imposition of a small additional cost on the practice of medicine in New York State. Whether that cost is connected with licenses, registrations or anything else is immaterial. Evidently recognizing this, the Appellate Division assumed *arguendo* that the challenged legislation "affects the underlying medical licenses"—that is, that the increase in the cost of registrations had some effect on an acknowledged property right—and asked whether that effect rose to the level of an unconstitutional "taking." The court's conclusion in the negative was plainly correct and requires no further review.

The Appellate Division applied the same approach taken by this Court in analyzing any takings claim under the Fifth Amendment of the United States Constitution. According to this Court, the three factors which have "'particular significance'" in "identifying a 'taking' forbidden by the Fifth

Amendment" are " '(1) the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.' " *Connolly v Pension Benefit Guaranty Corp.*, 475 US 211, 224-25 (1986) (*quoting Penn Central Transportation Co. v New York City*, 438 US 104, 124 [1978]). All three factors, as the Appellate Division saw, weigh in favor of the legislation. The economic impact of a regulation must be "so substantial as to constitute a taking under our precedents." *Bowen v Gilliard*, 483 US 587, 607 (1987). If the economic impact of a statute renders the activity covered by the statute "commercially impracticable," *Keystone Bituminous Coal Assn. v DeBenedictis*, 480 US 470, 493 (1987), or deprives a property owner of the " 'economically viable use' " of his property, *Nolan v California Coastal Commission*, 483 US 825, 834 (1987) (*quoting Agins v Tiburon*, 447 US 255, 260 [1980]), the taking is of constitutional proportions. In the present case, however, the challenged legislation effects no more than a slight change in the cost of registration. It does not otherwise alter the conditions of the licensing or registration of physicians, does not prevent any physician from practicing medicine because he or she cannot pay the increased fee, and certainly did not render the practice of medicine in New York during 1991 economically "impracticable" or less than "viable." Plaintiffs do not and dare not suggest that an additional $92 charge for the privilege of practicing medicine in New York causes an economic impact on physicians sufficiently substantial to amount to a "taking." Nor can they argue colorably that this increase "has interfered with distinct investment-backed expectations" to a constitutionally-cognizable extent.

The slight increase in fees for 1991 is likewise not governmental action of a "nature" or "character" that constitutes a taking. There was of course no physical seizure of physicians' property in this case, but only an adjustment of "the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 US at 125. The small increase in the cost of registration that results from the legislation is simply a balancing of physicians' interests with New York's "legitimate interest in maintaining the quality of medical care within its borders." *Bigelow v Virginia*, 425 US 809, 827 (1975). Physicians' registrations fees are not commingled with other state revenues. Rather, they fund the Office of Professional Medical Conduct, which carries out the administrative, investigatory and legal functions of the State Board of Professional Medical Conduct, which in turn is charged with dealing with "matters of professional misconduct" in the medical profession. Physicians' registration fees thus serve an important public purpose. The increase in fees directly strengthens New York's ability to monitor medical misconduct. As this Court has noted, " '[t]hose who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.' " *Connolly*, 475 US at 227 (*quoting FHA v The Darlington, Inc.*, 358 US 84, 91 [1958]). Similarly, plaintiffs cannot properly object that, given the "character" of the challenged legislation, which does little more than impose a small additional cost on the very profession to whose regulation these additional funds will be devoted, the slight effect on physicians' property rights amounts to an unconstitutional taking of those rights.

The distinction between a license and a registration, and a calibration of the property rights attendant upon one or the

other, is thus unnecessary for a resolution of this case on the merits. Assuming *arguendo*, as the Appellate Division did, that increasing the cost of physicians' registrations by $92 interferes to some extent with the ability to practice medicine in New York, the only question that need be asked is whether that interference rises to the level of an unconstitutional taking. There is no need for this Court to do as plaintiffs urge and "clarify" whether physicians have an independent property right in their registrations, for the outcome of the case remains the same regardless of how that issue is resolved.

II.

The question of whether the contract clause applies to implied contracts has already been resolved and requires no further examination by this court.

There is no reason for this Court to grant certiorari, as plaintiffs urge (Pet, pp 27-30), in order "to clarify whether the contract clause applies to implied contracts between the State and it subjects." First, that issue has been settled for more than sixty years. *See, Mississippi ex rel. Robertson v Miller*, 276 US 174, 179 (1928) (protection of Contract Clause extends to implied contracts "just as it does to those specifically expressed"). Moreover, contracts created by statute between a State and its citizens are virtually always "implied." Courts dealing with Contract Clause claims examine statutes not for the formal properties of contracts, but rather for " 'an adequate expression of an actual intent' of the State to bind itself." *National Railroad Passenger Corp. v Atchison, Topeka & Santa Fe Ry. Co.*, 470 US 451, 466-67 (1985) (*quoting Wisconsin & Michigan Ry. Co. v Powers*, 191 US 379, 386-87 [1903]). When courts find that statu-

tory language creates a contractual right, it is because the contract can be inferred from that language. *See, e.g., Indiana ex rel. Anderson v Brand*, 303 US 95, 100 (1938).

The criteria by which courts may determine whether statutory language implies a contractual obligation by which a State is bound are well established. On the one hand, if a statute evinces an intent of the State to bind itself, it creates or contains a contract. On the other hand, in the absence of a clear expression of such actual intent, the presumption is that the statute "is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge v Board of Educ.*, 302 US 74, 79 (1937). The Appellate Division simply applied these well-established principles to the facts of the case at hand, correctly concluding that "[t]he statutes in question are clearly general in scope based upon public policy considerations and cannot be interpreted to manifest a legislative intent to create private rights of a contractual nature enforceable against the State." Plaintiffs do not challenge this decision on its own terms, instead urging that this Court review the case to "clarify" a matter that has been clear for decades. Contracts created by state statute are almost always "implied"; the question in any given case is whether the particular statute at issue implies a contract. The Appellate Division held that the New York statutes dealing with physicians' registrations did not create contractual rights. New York's highest court held that plaintiff's constitutional argument was not "substantial" enough to warrant further judicial review, let alone reversal. Plaintiffs offer no reason for this Court to consider the matter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
May 13, 1994

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No. 93-1637

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MEDICAL SOCIETY OF THE STATE OF NEW YORK and NATHANIEL H. SOLOMON,
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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New York—Appellate Division Third Judicial Department

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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---

MOTION OF THE AMERICAN MEDICAL ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American Medical Association ("AMA") respectfully moves this Court for permission to file a brief as *amicus curiae* in support of the petition in this case. Pursuant to Supreme Court Rule 37.2, *amicus* sought the written consent of all parties to the filing of this brief. Petitioners have consented but respondents have not. Accordingly, *amicus* must file this motion with the Court.

Amicus respectfully submits that there are compelling reasons to grant this motion. As the statement of interest in the attached proposed brief explains, *amicus* is a national organization representing hundreds of thousands of practicing physicians nationwide. As such, *amicus* is vitally concerned about the constitutionality of state statutes that restrict the ability of physicians to practice medi-

cine. In addition, thousands of the AMA's physician members practice medicine in the state of New York and will be directly affected by the outcome of this case.

Amicus seeks leave to file this brief in order to bring to the Court's attention the importance of the decision below to physicians across the country. As noted in the attached proposed brief, all 50 states and the District of Columbia require physicians to pay a registration fee in order to maintain a valid license for medical practice. The decision of the Appellate Division of the Supreme Court of New York upholding a statute that effects a mass-cancellation of physician registrations for no purpose other than to raise funds is a deeply troubling precedent that will only encourage other states to follow suit.

Amicus also wishes to present its view that the decision below is inconsistent with controlling decisions of this Court and compounds the considerable confusion over the scope of the Contract Clause and the Takings Clause. *Amicus* endorses but will not repeat the arguments set forth in the petition. Instead, *amicus* focuses on the two constitutional questions raised by the decision below, and offers a legal analysis complementary to that of the petition. First, with regard to the Contract Clause, *amicus* seeks to demonstrate that the casual reliance of the appellate division on the pervasive regulation of medical practice is no substitute for the traditional analysis this Court has long employed for determining whether statutory terms, when relied upon by individuals, give rise to a contract. In particular, *amicus* brings to the Court's attention several authorities, including two cases decided by this Court, that are not cited in the petition but are directly relevant to the question of whether a contract was formed and that demonstrate the error of the decision below. See, *e.g.*, *Fisk* v. *Jefferson Police Jury*, 116 U.S. 131 (1885); *Mississippi ex rel. Robertson* v. *Miller*, 276 U.S. 174, 179 (1928).

Second, with regard to the Takings Clause, *amicus* demonstrates that the constitutionality of this statute

should be determined in light of this Court's unanimous decision in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980). Here, as in *Webb's Fabulous Pharmacies*, a state has promulgated overlapping statutes that purportedly serve the identical function—recovering registration fees for a single year. Because the net effect, in this case as in *Webb's*, is to exact a forced contribution to the state's general revenues, the statute here is invalid. The argument with respect to *Webb's* supplements, but does not duplicate, the petition's argument with respect to that decision. *Cf.* Pet. 24.

The brief that *amicus* seeks to file thus serves to place the decision below in national perspective and to draw the Court's attention to additional authorities that bear on the validity of the decision. *Amicus* believes that its brief will assist the Court in its review of the petition. *Amicus* therefore respectfully requests that this Court grant its motion for leave to file a brief as *amicus curiae* in support of the petition.

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QUESTIONS PRESENTED

Whether a state that offers to permit physicians, upon payment of a registration fee, to practice medicine for three years, but subsequently (after payment is received) cancels the third year of registration and compels re-registration in order to raise additional revenue,

(1) impairs the state's contractual obligation to honor its statutory commitment to register physicians for three years upon receipt of the statutorily prescribed fee, in violation of Article 1, Section 10, clause 1 of the Constitution of the United States; or

(2) effects a "taking" of physicians' property interests in their previously obtained registrations in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1637

MEDICAL SOCIETY OF THE STATE OF NEW YORK and NATHANIEL H. SOLOMON,
Petitioners,

v.

THOMAS SOBOL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New York—Appellate Division Third Judicial Department

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BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The American Medical Association ("AMA") is a private, voluntary, non-profit organization of physicians. The AMA was founded in 1846 to promote the science and the art of medicine and improve the public health. Its approximately 280,000 members—over half of all physicians currently licensed to practice medicine—practice in all fields of medical specialization. Thousands of its members practice medicine in New York, and thus will be directly affected by the outcome of this case.

All states limit the practice of medicine to licensed physicians. Further, all states charge physicians a registration fee in addition to licensure fees. These fees typ-

ically support the state's regulatory oversight of medical practice. The AMA has long supported such regulatory efforts and continues to work with the federal government and state governments in cooperative and complementary efforts to regulate the practice of medicine, to set high standards for physician performance, and to take disciplinary action where appropriate.

Nevertheless, *amicus* has a strong interest in ensuring that state laws governing the licensure of physicians do not unconstitutionally infringe the right of physicians to practice medicine. The decision below is of particular concern to *amicus* because of the ubiquity of licensing and registration requirements and the eternal temptation of governments to raise revenue from any source available. Accordingly, *amicus* wishes to present its views.

STATEMENT

In New York, as in all 50 states and the District of Columbia, a licensed physician must pay a registration fee to the state in order to practice medicine. Beginning in 1983, the New York state legislature adopted a triennial registration schedule under which physicians paid their registrations in full at the outset of each three-year period.[1] Physicians that began or resumed their practices during the last two years of a registration period were entitled to "receive a prorated refund of one-third of the total registration fee for each full year of the triennial period that has elapsed prior to the date of registration."[2]

The most recent triennial period began January 1, 1989. Physicians, such as petitioner Nathaniel H. Solomon, M.D., who paid their three-year registration fee prior to January 1, 1989, received a certificate confirming

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[1] *See* N.Y. Educ. Law §§ 6502, 6524(8) (McKinney 1985 & 1994 Supp.).

[2] N.Y. Educ. Law § 6502(3) (McKinney 1994 Supp.); *see* Pet. App. 37a.

their registration for the three-year period ending December 31, 1991. Pet. App. 26a-27a. In 1990, however, the state legislature abandoned the three-year registration schedule in favor of a two-year schedule. Rather than make the new schedule effective at the conclusion of the existing schedule (*i.e.*, January 1, 1992), the legislature simply cancelled the third year of the registration period. Registered physicians, such as Dr. Solomon, were notified that their registrations were no longer valid for three years, as the state had originally promised they would be. Because the third year of registration was cancelled, any physician who continued to practice into the third year without re-registering and paying a new fee would do so in violation of state law and be subject to loss of license. Pet. App. 27a-28a, 37a-40a; N.Y. Educ. Law §§ 6502(1), 6524(8)-(10) (McKinney 1985 & 1994 Supp.).

The trial court correctly held (Pet. App. 8a-17a) that the New York state legislature's decision to cancel the third year of physicians' registrations violated both the contracts clause (U.S. Const. art. 1, § 10, cl. 1) and the takings clause (U.S. Const. amend. V) of the United States Constitution. The Appellate Division nevertheless reversed. The appellate court found that the registration statute did not give rise to any contractual relationship between the state and physicians but "merely increased the registration fee involved." Pet. App. 5a. The court also rejected the takings argument, finding "no property right in the duration of the registration," a "limited financial impact on the overall practice of medicine," and "only a remote effect upon, or interference with, the ability of doctors to fully utilize their medical licenses." Pet. App. 6a.[3]

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[3] The State of New York Court of Appeals declined to review the decision of the Appellate Division, "upon the grounds that no substantial constitutional question is directly involved." Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

The decision of the Appellate Division is inconsistent with decisions of this Court and adds to the considerable confusion over the constitutional limits to retroactive state legislation. Given the pervasiveness of medical and professional licensure requirements and the persistent demand for new revenue sources, the decision below will surely lead to similar expropriations by other states. Only this Court can provide states with appropriate guidance on the constitutionally permissible boundaries of state legislation in this area. The constitutionality of this state statute, which was ruled invalid by the trial court, should be reviewed by this Court.[4]

I

This Court should review the Appellate Division's holding that New York's licensure and registration statutes do not give rise to a contract between physicians and the state that is protected by the Contract Clause. The point of departure in analyzing any statute challenged under the Contract Clause is the determination whether the statute creates contractual obligations protected from impairment by the United States Constitution. The analysis of the Appellate Division illustrates the need for guidance on this critical question. For the Appellate Division, it was sufficient simply to note that the practice of medicine is "comprehensively and pervasively regulated." Pet. App. 5a. Such an observation, though concededly true, is not sufficient to answer the serious constitutional question raised here. The growth

[4] This case would have qualified for plenary review under the Court's former appellate jurisdiction, because a state court has rejected a federal constitutional attack on the validity of a state statute. *See* 28 U.S.C. § 1257(a) (1988). Even though review of such cases is no longer mandatory, this factor may properly be considered by this Court in exercising its discretion to grant certiorari, particularly where, as here, the trial court invalidated the statute on federal constitutional grounds.

of the administrative state makes it possible today to characterize most professions and trades as a "heavily regulated business." *Id.* Extensive regulation has not, in itself, freed the states from their constitutional duty to respect their contractual obligations.

This Court has long established the basic principle that when a statute sets forth terms that invite individual performance, such performance by an individual gives rise to a contract with the state subject to the protection of the Contract Clause. As the Court stated in *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938), "a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of Art. I, § 10."

For example, in *Fisk* v. *Jefferson Police Jury*, 116 U.S. 131 (1885), the plaintiff, a district attorney, sued to recover the full amount of his salary and fees as set by the legislature at the time he performed his duties. The Court held that the publication of a rate of compensation together with performance by plaintiff gave rise to an implied contract: "[A]fter the services have been rendered, under a law . . . which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate." *Id.* at 134. In so holding, the Court emphasized that the Contract Clause extends to such implied contracts:

> The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation

> can no more be impaired by a law of the State than that arising on a promissory note.

Id. Similarly, in *Mississippi ex rel. Robertson* v. *Miller*, 276 U.S. 174 (1928), the court again applied the Contract Clause to invalidate a state statute that retroactively reduced a state employee's compensation following his performance under the terms set forth in a prior statute. The Court reaffirmed that the "constitutional protection" afforded by the Contract Clause "extends to such [implied] contracts just as it does to those specifically expressed." *Id.* at 179.

This Court's interpretation in *Fisk* and *Miller* of what constitutes a contract for constitutional purposes is consistent with and reflects the historical understanding of contract that underpins the common law system that the Framers, in enacting the Contract Clause, sought to protect. See *Crane* v. *Hahlo*, 258 U.S. 142, 146 (1922).[5] Under the common law, it is settled that the publication of an offer to compensate on certain terms in consideration for performance, followed by performance, gives rise to a contract. See, *e.g.*, *Restatement (Second) of Contracts* §§ 30, 33 (1981).

Against this backdrop, the trial court was plainly correct in finding the existence of a contract. The state of

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[5] *See also Williston on Contracts* § 1:1, at 2-3 (4th ed. 1990), and *Restatement (Second) of Contracts* § 1 (1981) (both defining "contract" as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty"). The commentators further note that promises giving rise to a contractual obligation may be expressly stated by the contracting parties or may be implied from the parties' conduct. *Restatement* § 4. Whether the contract is "express or implied," the distinction involves "no difference in legal effect, but lies merely in the mode of manifesting assent." *Id.* Similarly, "[t]he constitution makes no distinction between the one class of contracts and the other. It then embraces, and applies to both." Joseph Story, *Commentaries on the Constitution of the United States* § 697, at 499 (Carolina Academic Press reprint 1987).

New York, through its legislature, has published the terms on which it is willing to permit physicians to practice medicine in that state. In 1988, one of those terms specified that, upon payment of a registration fee, a licensed physician would be permitted to practice for a period of three years. By paying that registration fee, a physician signalled his or her acceptance of that offer. The state's subsequent delivery to the physician of a certificate confirming the three-year registration simply confirmed what the offer and acceptance had already evidenced: the formation of a contract.

Contrary to the Appellate Division's opinion, the state, in its challenged statute, did not merely increase the registration fee. There is no dispute that the state could have simply raised fees for the next registration period, but that is not what the state did. The state instead cancelled the registrations of physicians statewide, registrations that had previously been honored for the full three years of their statutory duration and which the state had plainly committed itself—through its statute—to honor.

At bottom, then, this case is fundamentally analogous to *Fisk* and *Miller*. As in those cases, the state here desired to have individuals provide the citizens of the state with a valuable service. As in those cases, the state here also desired to establish some of the terms on which those services would be provided. In *Fisk* and *Miller*, the state set the rate of compensation. In this case, the state set the terms and cost for engaging in medical practice. Thus here, as in *Fisk* and *Miller*, the state's decision to publish terms and the individuals' acceptance of those terms is sufficient to create a contract under the Contract Clause.

This Court has recognized that "in order that the constitutional mandate [of the Contract Clause] may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and con-

ditions, and whether the State has, by later legislation, impaired its obligation." *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. at 100. The Court should take up that inquiry here. The Appellate Division's casual reliance on the pervasiveness of regulation would, if allowed to stand, render the Contract Clause a dead letter not only in this case but in virtually all. Plenary review by this Court is therefore warranted.[6]

Indeed, the need for this Court's review and heightened scrutiny is particularly acute where, as here, the State has impaired its *own* contractual obligation simply in order to raise funds. Such cases deserve special attention because the "State's self-interest is at stake." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 (1977). As this Court has observed, "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.*; see also *Lynch* v. *United States*, 292 U.S. 571, 580 (1934). Because the courts below have condoned just such a result in this case, and because their decisions set a precedent that every state will be tempted to follow, this Court should grant the petition.

II

This Court also should review the Appellate Division's erroneous judgment that the new registration fees statute is not an unconstitutional taking. The Takings Clause

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[6] The appellate division did not expressly reach the question whether the subsequent legislation substantially impaired the obligation of a contract under the criteria set forth by this Court because it found no contractual obligation. But the appellate court's analysis of comparable issues under the takings clause leaves little doubt of the result it would have reached had it undertaken that inquiry. *See* Part II, *infra*. Accordingly, while the threshold question of the existence of a contract is in itself worthy of review, the Court could also consider the substantial impairment issue as well.

historically has been one of the most difficult areas of constitutional law in which to establish clear lines within which government constitutionally may act. In this case, however, a state court has upheld the legislature's decision to confiscate the third year of physicians' registration fees for no purpose other than a need for "general enhancement of revenues." Pet. App. 16a. Whatever the bounds of permissible state action under the takings clause, this action exceeds those bounds.

The Appellate Division erred initially in concluding that registration to practice medicine is not a property interest protected from arbitrary cancellation by the state. Property interests stem not from the Constitution but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). For example, an individual with "a legitimate claim of entitlement" to a state-granted benefit has a property interest in that benefit. *Id.*

Here, the law of New York clearly creates a property interest for takings purposes. Citing *Roth*, the New York Court of Appeals has confirmed that, under New York law, contributions that pay money to the state under terms set forth by statute have a property interest in those contributions that is violated when the state subsequently changes the use to which they are put. *Alliance of American Insurers* v. *Chu*, 571 N.E.2d 672, 678 (N.Y. 1991).[7]

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[7] In *Alliance of American Insurers*, the court held that the state created a property right when it promised through statute to provide some "return or credit" to the contributors to the state's insurance security fund. *Alliance of American Insurers* v. *Chu*, 571 N.E.2d 672, 678 (N.Y. 1991); *see* Pet. App. 11a. The court reasoned that if the state "failed to make such payments or credits to them, the contributors could have asserted a legitimate 'claim of entitlement' (*Board of Regents* v. *Roth*, 408 U.S. at 577) to the moneys, grounded in the statutory guarantee." 571 N.E.2d at 678. Accordingly, the court of appeals held that the state was forbidden

Under *Roth* and *Chu*, it would seem clear beyond dispute that physicians have "a legitimate claim of entitlement" (*Roth*, 408 U.S. at 577) in the third year of their registration. Registration is one of the prerequisites of the use of a professional license, and it is a benefit for which the physician directly pays the state. Having received the fee and issued the registration certificate, the state may not cancel the registration, confiscate the fees paid, and compel re-registration, simply for fund-raising purposes. *Alliance of American Insurers*, 571 N.E.2d at 678-80.

Physicians also have a property interest grounded in the "rules and understandings" that govern the licensure of professional activities. Because a failure to maintain valid registration is a complete bar to medical practice in New York, the state can no more arbitrarily cancel an otherwise valid registration than it can deny a license. It is well-established that the state's power to regulate medical practice does not permit it arbitrarily to prevent a physician from practicing altogether. *Dent* v. *West Virginia*, 129 U.S. 114, 121 (1889).[8] Even outside the professional context, this Court has specifically recognized that individuals have a property interest in maintaining state-granted licenses. *Bell* v. *Burson*, 402 U.S. 535, 539 (1971). Having paid the statutorily prescribed registration fee and received written confirmation from the state that his or her registration is valid, a physician has a

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to alter retroactively the statutory requirements where the "effect" is to allow the state to use the fund "as a means of raising revenues for the State's general purposes." *Id.* at 680. Here, as in *Alliance of American Insurers* v. *Chu*, the effect of the state's decision to cancel the third year of physicians' registrations and compel re-registration is simply to free up funds for the state's general purposes.

[8] This Court has repeatedly held that the right to engage in a profession is a constitutionally protected property interest. *See Willner* v. *Committee on Character & Fitness*, 373 U.S. 96, 102 (1963); *Konigsberg* v. *State Bar*, 353 U.S. 252, 262 (1957); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957).

legitimate claim to that registration and therefore a protected property interest.

The Appellate Division also erred in concluding that the state's confiscation of the third year of registration was not an unconstitutional taking. This Court's unanimous decision in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), should control the outcome here. In *Webb's Fabulous Pharmacies*, the Court struck down a Florida statute that appropriated the interest that accrued on interpleader funds deposited in the registry of a county court. The Court emphasized the fact that, pursuant to another state statute, the court clerk was entitled to and did receive a fee for the clerk's services in receiving and handling the fund. *Id.* at 155-56, 164-65. Because the state had separately provided for compensation for the clerk, the statute appropriating the interest amounted to "a forced contribution to general governmental revenues" that was "not reasonably related to the costs of using the courts." *Id.* at 163.

New York's appropriation of physicians' third year of registration fees fails for the same reason as Florida's appropriation of the interpleader fund in *Webb's Fabulous Pharmacies*. Like Florida, New York already had in place a fund of moneys (the three-year registration fees) to be used for its oversight duties in 1991. Its subsequent statute purports to fund those same oversight duties for the same year. Pet. App. 6a-7a. But the effect is no different than that condemned in *Webb's Fabulous Pharmacies*: the state, by cancelling the third year of registration, confiscating the fees paid for that year, and compelling payment of a new round of fees for the same year, effectively achieved a "forced contribution to general governmental revenues" from physicians. 449 U.S. at 163. Here, as in *Webb's*, this Court should review the decision of the state court upholding such an action and reaffirm that the takings clause "stands as a shield against the arbitrary use of governmental power." *Id.* at 164.

Finally, the Appellate Division's conclusion that the cancellation of registration has only a "limited financial impact on the overall practice of medicine" (Pet. App. 6a) is erroneous and merits review by this Court. It is true that measuring the cost of re-registration against the value of the overall practice of medicine certainly results in a limited impact. But *amicus* submits that the Appellate Division erred in identifying both the numerator and denominator. New York has taken the entirety of physicians' registrations for the year 1991: a sum amounting to several millions of dollars—substantial by any measure. That sum—as well as the right to practice medicine in New York for one full year—vanished upon the enactment of the revised Section 6524. The fact that physicians can recover their registrations by payment of an additional sum (approximately $8 million in the aggregate, see Pet. 26) does not compensate for the taking.

* * * *

States have a legitimate interest in raising funds for governmental purposes. This Court, however, has long been vigilant in ensuring that these fund-raising efforts do not transgress constitutional limits. Here, the state of New York has seized upon one of the most common state-imposed conditions of medical practice—payment of a registration fee—and simply cancelled wholesale the otherwise valid registrations of tens of thousands of physicians, thereby compelling physicians to pay twice for the same benefit. The state's justification, accepted by the courts below, was merely its desire to raise money. In cases involving the Contract Clause as well as the Takings Clause, this Court has expressly ruled such a justification inadequate. The lower courts' cursory review and casual dismissal of these constitutional issues, if let stand by this Court, will strongly encourage other states to follow New York's lead. Accordingly, the decision below is one of national importance that merits this Court's review.

CONCLUSION

For the reasons stated above as well as those stated in the petition, the petition for writ of certiorari should be granted.

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